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Supreme Court, U.S.
FILED

97 910 NOV 28 1997

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No.

In The

Supreme Court of the United States

October Term 1997

Carol Kiker and Devon Kiker

Petitioners,

vs.

Paul J. Miller, Jr.,
Individually and as Circuit Judge of the Circuit Court of Russell County,
and J. Pelham Ferrell,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Carol Kiker
Devon Kiker
Pro Se
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(334) 27-3600

5 9 P P

QUESTION PRESENTED

Are claims precluded in federal court where claimant was subjected to show cause hearing in state proceeding at which hearing officer refused her the right to cross examine witnesses or present her own evidence, and claimant sought state review by common law writ of certiorari?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were Petitioners, Carol Kiker and Devon Kiker, and Respondents Paul J. Miller, Jr., Judge of the Circuit Court of Russell County, Alabama, and J. Pelham Ferrell. The same parties are before this court.

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OPINIONS BELOW

The United States District Court, Middle District of Alabama, rendered an order denying Carol Kiker's request for preliminary injunction on March 21, 1994. (App. 14.) A separate order was rendered the same day granting respondents' motions to dismiss the due process claims asserted by Carol Kiker. (App. 12.) The court denied, without opinion, Carol Kiker's motion for a name-clearing hearing on October 25, 1995.

On March 5, 1996, all claims of Devon Kiker were dismissed. (App. 5.) By order dated March 29, 1996, summary judgment was granted in favor of Ferrell on all remaining claims. (App. 4.) On April 1, 1996, the court denied the Kikers' motion for leave to appeal the non-final orders above.

The sole remaining claim, Carol Kiker's allegation that her first amendment rights were violated by Miller, came on for a jury trial on April 8, 1996. The jury returned a verdict in favor of Miller and judgment was entered accordingly.

The Eleventh Circuit Court of Appeals affirmed without opinion on March 7, 1997. (App.3) Petition for rehearing and suggestion of rehearing en banc was denied on September 2, 1997. (App. 1)

Petitioners file this timely Petition for Writ of Certiorari.

JURISDICTION

Petitioners invoke the jurisdiction of this court pursuant to 28 U.S. C. SS 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

First and Fourteenth Amendments

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, as amended.

STATEMENT OF THE CASE

Petitioner Carol Kiker (Carol) served as Register of the Circuit Court in Russell County Alabama from 1975 until she was removed from office in 1993 by Circuit Judge Paul J. Miller, Jr. (Miller).[1] (App. at 6) Registers were appointed for six year terms and could be removed only for cause, (App. At 34) and as such, Carol had a property interest entitling her to due process.

Petitioner Devon Kiker (Devon) currently holds the elected office of Circuit Clerk in Russell County. He has served in the clerk's office since 1960. J. Pelham Ferrell (Ferrell) was a practicing attorney in Russell County until his retirement in 1995. Diane Alford has been Miller's secretary for more than 30 years, first in his private practice and eventually in the court system.

During the early 1990's legislation was proposed to provide a significant pay raise for judicial secretaries statewide. The proposal did not include an increase for the staffs employed

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[1] Miller's term of office expired in January of 1997 and he no longer serves as judge.

in the clerk's or register's offices, as had been the custom since 1977.[2] Carol was first vice president of a state association for clerks and registers. The association launched an effort to have their employees included in the pay raise. The Kikers were both active in this effort.

In Spring of 1992 domestic relations petitions were filed in the register's office involving two of the Kikers' sons.

In June of 1992 the Kikers had three conversations with Miller and his secretary about the pay raise legislation. The Kikers contend that both Miller and his secretary expressed their outrage over the Kikers' opposition to the legislation. Immediately after the conversations, Miller wrote Carol a letter accusing her of mishandling the domestic cases. The letter said that "if an incident of this nature should occur again, I may have to make a finding under Section 12-17-110c," which is the Alabama statute that provides for removal of a register.

In July of 1992 Miller held an interview with a newspaper that subsequently published his comments declaring that both Devon and Carol had improperly handled the domestic cases.[3] Miller's remarks received widespread publication in a two-state area.

On July 31, 1992, Peggy Allen, a former judicial secretary, visited Ferrell's office to seek his advice about her liability for writing a letter to the newspaper critical of Miller's remarks. During the visit a discussion was had about a personal relationship between Miller and his secretary. Shortly after the meeting, Ferrell went to Miller's office and told both Miller and his secretary about the conversation with Mrs. Allen, but

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[2] Neither of the Kikers would have received any pay increase or benefit from the legislation.

[3] As Clerk of the Court, Devon had no responsibility for domestic cases.

falsely attributed the remarks about an "affair" to Carol.

On August 1, 1992, Devon had a telephone conversation with Miller. The Kikers contend that during that conversation Miller told Devon he was going to remove Carol from office because Ferrell had reported to him that Carol discussed the rumored affair.

On September 18, 1992, Miller entered an order[4] directing Carol to appear and show cause why she should not be removed from office for the handling of the domestic cases. (App. at 32) Miller appointed Ferrell to serve as amicus in the proceedings.

Through counsel Carol attempted to conduct discovery prior to the hearing. The state's attorney general then appointed attorneys to represent Miller.[5] On motion of his counsel, Miller quashed Carol's notices of deposition of his witnesses. (App. at 33) Miller's counsel subsequently issued subpoenas for Carol's staff to appear for informal interviews. The subpoenas provided five minutes notice. Carol's counsel was not allowed to be present for the interviews.

Carol petitioned the Alabama Supreme Court for a Writ of Mandamus directing Miller's recusal. The writ was denied. The Court held that no hearing was required prior to the removal of a register for cause. Therefore, the court said, there is no right to a fair or impartial hearing or pre-hearing discovery. (App. 32) Ex Parte Kiker, 612 So.2d 543, (Ala. 1993)

Despite the ruling, Miller rescheduled the Show Cause Hearing. During the hearing Carol's counsel attempted numerous times to present testimony and documentary evidence

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[4] The Order to Show Cause was opened in a Circuit Court file and is maintained as a permanent public record.

[5] Until this time Miller was not represented.

regarding her lobbying activities and to prove that the domestic files were not handled improperly. Miller refused to allow such evidence into the record. During a five hour hearing, Miller ruled against Carol 178 times, often ruling when no objection was made. Among the items he refused to receive into evidence were (1) his own order directing the assignment of domestic cases, (2) an act of the Alabama Legislature, and (3) a certificate of the Alabama Secretary of State. He refused to allow Carol's counsel to proffer the evidence.

Ferrell attended the hearing as amicus. The Kikers contend that as objections were made Ferrell would make a visible sign indicating how Miller should rule. Petitioners contend that Respondents conspired to hold a sham hearing so the record would be devoid of exculpatory evidence and would thereby be upheld on the narrow review by common law certiorari.

On February 16, 1993, Miller entered an order removing Carol from office. He made findings that the Kikers' daughters in law had been deprived of due process, and that Devon had improperly held the files in the clerk's office.[6] He stated that the former daughters-in-law had suffered economic losses as a result of the Kikers' actions. (App. 29) Miller later admitted on deposition that the finding was false. The order was widely published in Alabama and Georgia. Having no statutory right of appeal, Carol filed for a common law writ of certiorari in the Alabama Supreme Court. The court affirmed without opinion. (App.28) Request for re-hearing was denied.(App.27)

On January 18, 1994, Carol filed a S 1983 claim in the Middle District of Alabama alleging that Respondents violated her constitutional right to due process, freedom of speech and to seek redress for grievances. The petition requested a preliminary injunction and temporary restraining order which

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[6] Devon had no notice prior to this finding.

were both denied. (App. At 26) A motion for name-clearing hearing for Carol was also denied. The complaint was amended to include allegations that Respondents denied Devon constitutional rights to due process, freedom of speech, and to seek redress for grievances. The petition requested a name-clearing hearing for Devon, which was denied.

Petitioners' appeal to the Eleventh Circuit was affirmed without opinion. Petition for re-hearing and hearing en-banc was denied.

SUMMARY

The Eleventh Circuit's affirmance of the District Court's dismissal based on Rooker-Feldman is in conflict with relative decisions of this court and of other courts of appeal. The holding is also inconsistent with a long line of cases that stand for the premise that federal claims are not barred where claimant was not afforded a full and fair opportunity to litigate his claim in state court:

> [C]ollateral estoppel effect will not be given to a state court judgment where there was not a full and fair opportunity to litigate the claim in state court or where the state court demonstrated inability or unwillingness to protect federal rights. Haring v. Prosise 103 S.Ct 2368 (1983)

Petitioner Carol Kiker was subjected to a sham hearing contrived by the respondents to restrict the record so there could be no meaningful review on certiorari. ("The appellate court will not review technical questions (on certiorari) regarding the trial court's rulings on objections to the admission of evidence.") Young v. City of Huntsville, 342 So 2d 918, 924,

(Ala. 1976). She had no opportunity to present evidence of this conspiracy.

After the "hearing" respondents prepared, and released for publication, a state circuit court order finding that petitioners used their public offices to deprive others of due process. Petitioners have been afforded no opportunity to challenge the incredible process that allowed the finding to be made. Additionally, petitioners were stigmatized by Respondent Miller's remarks to the newspaper prior to the hearing. Petitioners have had no opportunity for a name-clearing hearing to remove the stigma created by that action.

This case is representative of the mischief of the Rooker-Feldman doctrine. Carol Kiker's federal claims were held to be precluded because she sought certiorari review in the Alabama Supreme Court. Had she not sought such review, her claims would have been subject to dismissal for failing to use all the state process available.

The inconsistent application of the Rooker-Feldman doctrine has operated, in cases where there is no state statutory appeal, to abrogate the due process protections that this court has determined are necessary to protect constitutionally created rights. Civil rights litigants are unable to discern a clear path to the proper forum in which to file their claim. The confusion has resulted in the preclusion of meritorious claims that were never litigated

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ARGUMENT

THERE IS A SPLIT AND CONFUSION AMONG THE CIRCUITS OVER THE APPLICATION OF PRECLUSION WHERE LITIGANTS CLAIM LACK OF OPPORTUNITY TO PRESENT CLAIMS IN STATE PROCEEDINGS.

This case presents the legal quagmire that S 1983 litigants must confront over preclusion issues when there is no state statutory appeal available. This court has held that federal district courts may not exercise jurisdiction to decide federal issues that are inextricably intertwined with a state court's judgment. See Rooker v. Fidelity Trust Co., 44 S.Ct 149(1923) and District of Columbia Court of Appeals v. Feldman, 103 S.Ct. 1303 (1983).

A person who is deprived of due process in a state action must initially resolve whether his recourse is to request review in the state appellate court, or file his claim in the federal district court. To make this decision, it must first be determined (1) whether a Section 1983 litigant must avail himself of all state process available, and (2) whether his claims are inextricably intertwined with the state action under the precepts of Rooker-Feldman .

One line of cases holds that a federal claim for lack of due process cannot be sustained if the litigant has not availed himself of all state process due. ("He cannot argue that he was not provided a full and fair opportunity to litigate the claim where he failed to properly seek appellate review.") Kremer, 456 U.S. at 485, 102 S.Ct. at 1889 [7]

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[7] The Eleventh Circuit, in McKinney v. Pate, 20 F.3d 1550 (1994) held that there is no procedural due process violation "unless and until the State ....refuses to make available a means to remedy the deprivation.....[O]nly the

In Alabama the only review available, absent a statutory appeal, is by common law certiorari. ("In cases such as this, where an applicable statute provides no right of appeal and no statutory certiorari review, the only available means of review is the common law writ of certiorari.") Fields v. State ex rel. Jones, 534 So.2d 615 (1987). The writ is severely restricted in its scope of review: (" It cannot be exercised to review the judgment as to its intrinsic correctness, either on the law or on the facts of the case.") Alabama Electric v. Alabama Power, 176 So.2d 483 (1965). Petitioners maintain that this restricted review is inadequate to satisfy minimum due process requirements and does not deprive the lower federal court of jurisdiction:

> This understanding of s1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim. Allen v. McCurry, 449 U.S. 90, 100, 101 S.Ct. 411, 418, 66 L.Ed.2d 308 (1980),

The next equation of the preclusion dilemma is the holding that lower federal courts cannot obtain jurisdiction if the claims are "inextricably intertwined" with the state court action. Thus, to make the threshold decision of the proper forum to use, litigants must somehow be able to determine whether their due process claims are "inextricably intertwined" with the state court action. Due to the inconsistent application and confusion of Rooker-Feldman, there is no correct answer. Litigants can

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state's refusal to provide a means to correct any error resulting from the [defect] would engender a procedural due process violation." 20 F.3d at 1563.

apply no more than a reasoned guess to the question. A wrong guess is fatal to the claim and the litigant is deprived of any forum, state or federal, in which to vindicate constitutional rights.

In Bechtold v. City of Rosemont, 104 F.3d 1062 (1997) the Eighth Circuit commented on the quandary:

> [A] city or county employee in Minnesota may be placed in a "catch-22" dilemma when pursuing a wrongful discharge claim which encompasses federal claims. If the plaintiff loses at the administrative level and appeals through a Dietz writ procedure, even if the court of appeals reserves the SS1983 claim, there is a danger that the ultimate judgment can nonetheless serve to collaterally estop the SS1983 claim under 28 U.S.C. SS1738 ....., or, as here, be barred from consideration in the federal court under the Rooker-Feldman doctrine. If the plaintiff seeks only state administrative relief and does not apply for review under a writ of certiorari, a subsequent SS1983 claim filed in federal court may be barred under principles of collateral estoppel. Bechtold v. City of Rosemont, 104 F.3d at 1066.

There is little harmony among the circuit courts of appeal in the application of Rooker-Feldman. The second circuit recently acknowledged the diversity:

> Since Feldman, the Supreme Court has provided us with little guidance in determining which claims are "inextricably intertwined" with a prior state court judgment and which are not..... The result has been inconsistency in the lower federal courts faced with challenges based upon the Rooker- Feldman

> doctrine. Moccio v. New York, 95 F.3d 195 (1996) (citations omitted).

In a Seventh Circuit case similar to this one, Jones v. Alton City, 757 F.2d 878, (1985), the court denied preclusion. Jones was denied the right to present his evidence at an administrative hearing (unlike petitioner herein, Jones was allowed to proffer his evidence). He subsequently processed an appeal through the Illinois Supreme Court. The court said:

> We conclude that defendants have not sustained their burden of showing with clarity and certainty that the issue was or could have been determined by the prior judgment. We believe that this burden was insurmountable, because we believe plaintiff was prevented from presenting his evidence on the mistaken theory that racial discrimination was irrelevant to his discharge. Jones vs. Alton City, 757 F.2d at 886.

Indeed, the Eleventh Circuit itself appears to have taken inconsistent positions reflecting the split and confusion among the circuits on this issue. In Washington v. Kirksey, 811 F.2d 561, the court wrote:

> It is the opportunity to be heard which is protected by the fourteenth amendment. Due process of law does not allow the state to deprive an individual of property where the state has gone through the mechanics of providing a hearing, but the hearing is totally devoid of a meaningful opportunity to be heard. Washington v. Kirksey, 811 F.2d at 564.

In the present case, petitioner was subjected to a "hearing" that she maintains amounted to nothing more than a judicial burlesque, but was found to be barred by Rooker-Feldman after petitioning for review by common law certiorari.

Compare the case of Webb v. State of Alabama, 850 F.2d 1518 (1988). A foster parent (Webb) whose foster child was removed from his home by the Department of Human Resources, pursued the return of the child by requesting a post-removal administrative hearing conducted by the DHR. Webb was represented by counsel and called approximately 50 witnesses. DHR's removal of the child was upheld. Webb then appealed DHR's decision to the Family Court Division of the Montgomery County Circuit Court, which found that the administrative decision was supported by substantial evidence. Webb then appealed the to the Alabama Court of Civil Appeals, which affirmed the Circuit Court. The Alabama Supreme Court denied certiorari. Thereafter, Webb filed a Section 1983 action in the U.S. District Court. The case was dismissed by the court as being barred by the principles of res judicata and collateral estoppel. The Eleventh Circuit reversed, finding that despite all of the proceedings which had gone on prior to its decision, Webb's Section 1983 action was neither barred by res judicata nor collaterally estopped. The court stated as follows:

> Whether part of the same cause of action or not, if the due process claims raised under section 1983 were not decided in the state court proceedings, there can be no collateral estoppel. Webb could not have raised the due process claims in the original administrative hearing because those claims arise as a result of the hearing itself. The question, therefore, is what was decided by the state appeals. Webb, 850 F. 2d at 1520 (emphasis added) (citations omitted).

Like Webb, Petitioner's due process claims arose as a result of the "hearing" she was afforded. The court discussed the fact that the appellate review in Webb's case was conducted

within the narrow confines of a common law writ of certiorari as follows:

> The limited nature of common law certiorari review is substantiated by the fact that Webb in his state appeal did try, without success, to raise one of the due process claims in this case. Webb included a section in his petition for common law certiorari that alleged "(I)nadequate notice as to how to proceed or what reasons were behind the child's removal." The family court completely ignored the claim in its judgment. Apparently proper under the rules of Alabama's common law writ, the family court's treatment of the notice issue is a compelling sign that Webb's due process claims could not have been raised and considered in the context of the common law writ of certiorari review. Webb, 850 F.2d at 1523 (emphasis added) (interpolation in original).[8]

The present case exemplifies the unjust result that can occur when Rooker-Feldman is applied without a thorough examination of whether the state process was sufficient to protect due process rights. Here, the central accusation against petitioner was that she failed to follow proper procedures in assigning domestic cases. At the "hearing" she attempted to introduce her accuser's own order instructing her how to assign the cases. He refused to receive the order into evidence. Thus the reviewing court had no evidence in the record to rebut his finding that petitioner had mishandled the cases. The Alabama Supreme Court has consistently held that it will not review such rulings on certiorari:

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[8] Also see Wood v. Orange County, 715 F.2d 1543 (11th Cir 1983), cert. denied, 467 U.S. 1210 (1984) which held that the Rooker-Feldman doctrine does not apply when litigants did not have a reasonable opportunity to raise their constitutional claims before the state court.

> Appellant assigns as error a number of rulings by the court on rejection of evidence sought to be introduced by appellant. These rulings are not reviewable in a certiorari proceeding, since there is substantial evidence to support the conclusion of the court. Houser v. Young, 25 So.2d 421, 422 (Ala. 1946).

Hon. David B. Bryne, Jr., represented Petitioner Carol Kiker at the administrative hearing. The following uncontroverted testimony regarding the Respondents' actions was elicited from Mr. Bryne during the hearing for preliminary injunction before the district court:

> "Q. What part did [Mr. Ferrell] play?
>
> "A. ...In many instances, when an objection was made, Mr. Ferrell would either nod his head either in an upward and downward motion or to the side, and a ruling, would come....."

(R2-36-5).

> "Q. [Constitutional issues] were raised by you, but there was no evidence of any constitutional evidence put on at the hearing, was it?"
>
> "A. I sought to put that evidence on, objections were sustained to it."

Id. At 6

> "Q. And as an officer of the court you certainly were not prevented from stating anything to the court, were you – there were some limitations on what you were allowed to ask witnesses, but you were not limited in what you could argue, or state on the record representing your client, were you?"

"A. Yes, sir."

"Q. Did Judge Miller forbid you from saying-something at any point in time?"

"A. I sought to make a proffer, which he refused to allow me to do."

Id. At 6

The lower court's preclusion on Rooker-Feldman necessarily makes a finding that such an unthinkable process was fair and provided a full and fair opportunity to be heard.

The district court's holding presents a dichotomy that illustrates the confusion of Rooker-Feldman. It held that Petitioner Carol Kiker's first amendment claims were not barred because it would have been impossible to have developed the claim before Judge Miller, or before the Alabama Supreme Court which relied on the record before Judge Miller. (App. at 7) Yet the court held that the due process and conspiracy claims were precluded, apparently ruling that petitioner did have a fair opportunity to present those claims in the same process it held to be deficient for the First Amendment claims.

CONCLUSION

The scope of review on common law writ of certiorari clearly does not rise to the level of the full and fair opportunity to be heard that this court has found necessary to satisfy the minimum requirements of due process. Therefore, the Rooker-Feldman doctrine should not preclude federal claims in cases where the claimant has been denied a procedurally sound hearing in state court. (Res judicata "is a principle of public

policy and should be applied so as to give rather than deny justice.") Dore vs. Kleppe, 522 F.2d 1369, 1374 (5th Cir, 1975).

Petitioners respectfully request this court to grant the Petition for Writ of Certiorari.

Respectfully Submitted

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FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP -2 1997
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6464

CAROL KIKER
DEVON KIKER

Plaintiffs-Appellants

PAUL J. MILLER, J.,
Individually and as
Circuit Judge of the
Circuit Court of
Russell County,
JOHN PELHAM FERRELL, Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion_____, 11th Cir., 19____, _____F.2d_____)

Before: BIRCH, Circuit Judge, RONEY, Senior Circuit Judge and O'KELLEY*, Senior District Judge.

PER CURIAM:

The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

/S/ (Unintelligible)
UNITED STATES CIRCUIT JUDGE

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*Honorable William C. O'Kelley, Senior U.S. District Judge for the Northern District of Georgia, sitting by designation.

ORD-42
(6/95)

Kiker
v.
Miller

No. 96-6464
United States Court of Appeals
Eleventh Circuit
Mar 07, 1997

Appeal From: M.D.Ala.,No.9400056cvte
Affirmed.

Local Rule 36 case.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. The Eleventh Circuit provides by rule that unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition or motion.
Eleventh Circuit Rules, Rule 36-2, 28 U.S.C.A.)

IN THE MIDDLE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

CAROL KIKER	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO.
	)	94-T-056-E
PAUL J. MILLER, JR.,	)	
Individually, and as Circuit	)	
Judge of Russell County, and	)	
JOHN PELHAM FERRELL	)	
	)	
Defendants	)	

ORDER

Although there may be evidence that Plaintiff Carol Kiker and defendant John Pelham Ferrell did not like each other, Kiker has produced no evidence that Ferrell was motivated by a desire to retaliate against her for her participation in the pay-raise issue. Indeed, in her brief filed on March 18, 1996, at 11-16, Kiker submits that Ferrell wanted her dismissed from her job but she fails even to make an argument that Ferrell was motivated by the pay-raise issue. There is simply no evidence that Ferrell cared one way or the other on this issue.

Accordingly, it is ORDERED that the motion for summary judgment filed by defendant John Pelham Ferrell on March 5, 1996, is granted and that defendant Ferrell is dismissed from this litigation with prejudice.

The clerk of the court is DIRECTED to notify counsel by telephone.

DONE. This the 29th day of November, 1996.

/s/ Myron Thompson
UNITED STATES DISTRICT JUDGE

IN THE MIDDLE DISTRICT COURT OF THE UNITED

STATES FOR THE MIDDLE DISTRICT OF ALABAMA,

EASTERN DIVISION

CAROL KIKER,	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO.
	)	94-T-056-E
PAUL J. MILLER, JR.,	)	
individually, and as Circuit	)	
Judge of Russell County, and	)	
JOHN PELHAM FERRELL,	)	
	)	
Defendants	)	

ORDER

Plaintiffs Carol Kiker and Devon Kiker assert a number of claims against defendants Paul J. Miller, Jr., a trial judge in Russell County, Alabama, and John Pelham Ferrell, an attorney in Russell County, arising out of the dismissal of Mrs. Kiker as "register of equity" for the 26th Judicial Circuit in Alabama. The Kikers rest their claims on the free-speech and associational clauses of the first amendment and the due process and equal protection clauses of the fourteenth amendment to the United States Constitution as enforced through 42 U.S.C.A. Section 1983 (West 1994). The court has jurisdiction under 28 U.S.C.A. Subsection 1331 (West 1983), 1343 (West 1993).

The court now has before it Judge Miller and attorney Ferrell's motions to dismiss filed on February 23, 1995, challenging the claims

advanced by Mr. Kiker. For reasons that follow, Mr. Kiker's claims will be dismissed.[1]

I.

In considering a defendant's motion to dismiss, the court accepts the plaintiff's allegations as true, Fed.R.Civ.P. 12(b); Andreu v. Sapp, 919 F.2d 637, 639 (11th Cir. 1990), and construes the complaint liberally in the plaintiff's favor. Scheuer v. Rhodes, 417 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974). The lawsuit many not be dismissed unless the plaintiff can prove no set of facts supporting the relief requested. Scheuer, 316 U.S. at 236, 94 S.Ct. at 1686; Duke v. Cleland, 5 F.3d 1399, 1402 (11th Cir. 1993).

II.

Mrs. Kiker held the appointed position of register of equity for the 26th Judicial Circuit from October 1975 until February 1993, when Judge Miller dismissed her, allegedly because of the mishandling of cases involving her sons. Mrs. Kiker appealed this decision to the Alabama Supreme Court, which affirmed Judge Miller's decision without an opinion. Kiker v. Miller, 629 So. 2d 815 (Ala. 1993) (table).

On January 18, 1994, Mrs. Kiker filed suit in this court, contending that Judge Miller and attorney Ferrell violated her rights to "substantive" due process because Judge Miller's decision to terminate her was arbitrary and capricious; that they violated her right to "procedural" due process because Judge Miller improperly limited her opportunity to cross-

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[1] By order entered today, the court has allowed the Kikers to amend their complaint again. In considering the pending motions to dismiss, the court has considered the Kikers' complaint as amended today.

examine witnesses and explore pertinent subject areas, and that they violated her first amendment right because Judge Miller fired her in retaliation for her lobbying the Alabama Legislature regarding pay raises for her staff. In addition, Mrs. Kiker claimed that, although attorney Ferrell was without authority to discharge her, he is still liable because he "acted in concert" with Judge Miller to violate her constitutional rights.[2]

By orders entered on March 21, 1994, this court dismissed Mrs. Kiker's due-process claims pursuant to the principles of claim-and-issue preclusion and the Rooker-Feldman doctrine.[3] The court declined to dismiss her remaining first-amendment claim because, in the words of one of the March 21 orders, "There was no opportunity for (Mrs. Kiker) to have developed this claim either during her administrative hearing before Judge Miller--because (Mrs. Kiker) 's retaliation claim goes to Judge Miller's subjective intent it would have been impossible to have developed that claim before Judge Miller--or before the Alabama Supreme Court, which relied on the record before Judge Miller." See Wood v. Orange County, 715 F.2d 1543, 1547 (11th Cir. 1983) ("(T)he Rooker bar can only apply to issues that the plaintiff had a reasonable opportunity to raise"), cert. denied, 467 U.S. 1210, 104 S.Ct. 2398 (1984). And by order entered on October 25, 1995, the court disallowed summary judgment on Judge Miller's defense of qualified immunity.

The court also allowed Mr. Kiker, the clerk of the court for the 26th Judicial Circuit, to join his wife as a plaintiff. Mr. Kiker appears to claim

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2 Complaint filed on January 18, 1994, Paragraph 14.

3 District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303 (1983), and Rooker v. Fidelity Trust Co., 263 U.S. 413, 44. S.Ct. 149 (1923).

that Judge Miller and attorney Ferrell violated his constitutional rights in the following manner: they refused to allow him to participate in the dismissal proceedings regarding his wife; defamed him; threatened him; and otherwise interfered with the operation of his office as Clerk of the Court of the 26th Judicial Circuit. Unlike, his wife, Mr. Kiker is not an appointed official.

III.

After reviewing the claims asserted by Mr. Kiker against Judge Miller, the court concludes that he can prove no set of facts supporting the relief requested. In his brief filed on November 20, 1995, Mr. Kiker contends that such cases as Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976), and Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789 (1991), do not foreclose his claims against Judge Miller. This may be true. But Mr. Kiker misses the issue. He has failed to point to any law to support his claims either. Moreover, for these same reasons, attorney Ferrell, who is accused only of having acted in concert with Judge Miller, is also entitled to have the claims against him dismissed.

In addition, Judge Miller is entitled to qualified immunity. As this court previously explained in its order of October 25, 1995, an official sued in his individual capacity is protected by the doctrine of qualified immunity under which "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[4]

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[4] Judge Miller admits that when he removed Mrs. Kiker he was acting administratively and not judicially, and thus is not entitled to absolute immunity. Defendant Miller's brief filed on February 11, 1994, at 7-8. See also Ex parte

Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). A two-step analysis is followed to determine whether an official is entitled to qualified immunity. The defendant must first show that he was acting within the scope of discretionary authority at the time of the alleged conduct. Once this is shown, the plaintiff must prove that the official's conduct violated clearly established. Law. Sims v. Metropolitan Dade County, 972 F2d. 1230, 1236 (11th Cir. 1992).

In order to show that actions were within the scope of discretionary authority, a defendant "must demonstrate objective circumstances which would compel the conclusions that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority." Barker v. Norman, 651 F.2d 1107, 1121 (5th Cir. July 30, 1981);[5] accord Jordan v. Doe, 38 F.3d 1559, 1566 (11th Cir. 1994); Rich V. Dollar, 841 F2d 1558, 1564 (11th Cir. 1988). There can be no question that Judge Miller's actions toward Mr. Kiker would meet this test.

Therefore, only the clearly established-law prong of the qualified-immunity test is at issue. This prong must be met not through references to general propositions, but through the specifics of concrete cases. Lassiter v. Alabama A & M Univ., 28 F.3d 1146, 1149-50 (11th Cir. 1994) (en banc). "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable

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Kiker, 612 So2d 453, 456 (Ala.1993) (noting that Judge Miller was acting administratively in his actions regarding Mrs. Kiker).

[5] In Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the

government agent that what defendant is doing violates federal law in the circumstances." Id. At 1150 (emphasis in original). "Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent (government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent (government actor) or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit." Id. At 1149. Thus, "qualified immunity for government officials is the rule, liability and trials for liability the exception." Alexander v. Univ. of North Florida, 39 F. 3d 290, 291 (11th Cir. 1994), cert. denied, __U.S. ___, 115 S.Ct. 1699 (1995). "Because qualified immunity shields government actors in all but exceptional cases, courts should think long and hard before stripping defendants of immunity." Lassiter, 28 F.3d at 1149. Mr. Kiker has failed to point to any "pre-exiting" cases that "dictate, that is, truly compel....the conclusion" that what Judge Miller did violated federal law. Id. At 1150.

IV.

The court adds these comments. Mr. Kiker's dispute with Judge Miller appears to raise questions essentially going to the operation of the Circuit Court in Russell County, Alabama. This dispute is a state, not a federal matter, and should be resolved within and by the state courts.. All of Mr. Kiker's claims will therefore be dismissed, albeit without prejudice to his right to pursue his claims as state law claims.

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decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Accordingly, for the above reasons, it is ORDERED that the motions to dismiss filed by defendants Paul J. Miller, Jr. And John Pelham Ferrell on February 13, 1995, are granted and that all claims asserted by plaintiff Devon Kiker are dismissed without prejudice to his right to pursue his claims as state law claims in state court.

DONE, this the 5th day of March, 1996.

/s/ Myron Thompson
UNITED STATES DISTRICT JUDGE

IN THE MIDDLE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

CAROL KIKER,	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO.
	)	94-T-056-E
PAUL J. MILLER, JR., individually, and as Circuit Judge of Russell County, and JOHN PELHAM FERRELL,	)	
	)	
Defendants	)	

ORDER

This cause is also before the court on motions to dismiss filed by defendants. For the reasons given this day finding that plaintiff is unlikely to prevail on the merits and thus is not entitled to preliminary injunction relief, the court also finds that defendants' motions to dismiss should be granted as to plaintiff's due-process claims. The court cannot, however, say that the motions should be granted as to plaintiff's first amendment retaliation claim under either claim-and-issue preclusion or the Rooker-Feldman doctrine. There was no opportunity for plaintiff to have developed this claim either during her administrative hearing before Judge Miller--because plaintiff's retaliation claim goes to Miller's subjective intent it would have been impossible to have developed that claim before Miller--or before the Alabama Supreme Court, which relied on the record before Judge Miller.*

This is not to say, however, that plaintiff should still be allowed to pursue her retaliation claim. Judge Miller has raised the defense of

qualified immunity, and thus he should be shielded from litigation over this claim if plaintiff cannot establish the required evidence to overcome the defense. The court must admit, that from the limited evidence presented, it appears that plaintiff has no evidence to support her retaliation claim and is unlikely to produce any. The court therefore believes that it is best that this claim be disposed of quickly, with the plaintiff required to come forward with any evidence available to her immediately. The court will therefore treat defendants' motions to dismiss as motions for summary judgment as to plaintiff's retaliation claim, with plaintiff given a short but reasonable opportunity to come forward with evidence to support her claim of retaliation.

Accordingly, for the above reasons, it is ORDERED that:

(1) That the motions to dismiss filed by the defendants on February 11, 1994, are granted as to plaintiff's due-process claims; and

(2) That said motions are treated as motions for summary judgment and are reset for submission, without oral argument, on April 11, 1994, with the plaintiff to file any additional brief and evidentiary materials by said date.

DONE, this the 21st day of March, 1994.

/s/ Myron Thompson
UNITED STATES DISTRICT JUDGE

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* Indeed, Miller would probably be a necessary witness to plaintiff's retaliation claim.

IN THE MIDDLE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

CAROL KIKER,	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO.
	)	94-T-056-E
PAUL J. MILLER, JR.,	)	
individually, and as Circuit	)	
Judge of Russell County, and	)	
JOHN PELHAM FERRELL,	)	
	)	
Defendants	)	

ORDER

In this lawsuit, plaintiff Carol Kiker charges that her dismissal as "register of equity" for the 26th Judicial Circuit in Alabama violated the first and fourteenth amendments to the United States Constitution as enforced through 42 U.S.C.A. Section 1983 (West 1993). Kiker has named as defendants Paul Miller, Circuit Judge of Russell County, Alabama, and John Pelham Ferrell, an attorney in Russell County. She asserts that her rights to "substantive" and "procedural" due process under the fourteenth amendment were violated and that her dismissal was also in retaliation for her exercise of her first amendment rights. The court has jurisdiction under 28 U.S.C.A. Sections 1331 (West 1993), 1343 (West 1993).

The court now has before it Kiker's motion for a preliminary injunction restoring her to her position pending trial. Kiker rests her motion on only her due-process claims.[1] For the reasons set forth below, the motion will be denied.

I. BACKGROUND

Kiker held the appointed position of register of equity for the 26th Judicial Circuit from 1975 until February 1993. In 1992, she was a target of allegations that she abused her official position in two domestic relations cases in which her son and stepson were parties.[2] Circuit Judge Miller ordered Kiker to appear at a hearing and show cause why these alleged improprieties were not grounds for her dismissal.[3] Kiker was informed that "You have the right to be represented at said hearing by an attorney of your choosing, subpoena witnesses on your behalf, cross examine any witnesses of the Court and offer any evidence you may deem proper and which is admissable." Kiker sought a writ of mandamus from the Alabama Supreme Court requiring Miller to recuse himself from conducting the hearing on the ground that he had made statements reflecting that he had already prejudged the allegations and was thus not an impartial decision-maker. The Supreme Court refused to grant the writ, Ex parte Kiker, 612 So. 2d 453 (Ala. 1993) (per curiam), and a hearing was convened, with Miller presiding.

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[1] In her brief submitted in support of her motion, Kiker asserts only her due-process claims.

[2] Although the court does not address these charges in detail, they alleged that Kiker failed to comply with normal procedures for setting up hearing dates and for assigning files to the proper judges.

[3] These allegations also included charges of impropriety against Kiker's husband, who is the elected circuit court clerk in Russell County. No action has been taken against her husband.

The hearing was adversarial, with members of the Alabama Attorney General's Office prosecuting, with Kiker represented by counsel, and with witnesses appearing for both sides. After the hearing, Miller issued a ruling dismissing Kiker from her position. Kiker appealed this decision to the Alabama Supreme Court, which affirmed Miller's ruling without an opinion. Kiker v. Miller ____So.2d___ (Ala.1993).

On January 18, 1994, Kiker filed suit in this court, contending that Judge Miller violated her right to "substantive" due process because his decision to terminate her was arbitrary and capricious; that he violated her right to "procedural" due process because he improperly limited her opportunity to cross-examine witnesses and explore pertinent subject areas; and that he violated her first-amendment rights because he fired her in retaliation for lobbying the Alabama Legislature regarding pay raises for judicial secretaries. In addition, Kiker claims that, although Ferrell was without authority to discharge her, he is still liable because he "acted in concert" with Miller to violate her constitutional rights.[4]

II. DISCUSSION

The Eleventh Circuit Court of Appeals has established a four-pronged test for determining whether a preliminary injunction should issue. The movant must show "(1) a substantial likelihood that she will ultimately prevail on the merits; (2) that she will suffer irreparable injury unless the injunction issues, (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that if issued, the injunction would not be adverse to the public

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[4] Complaint filed on January 18, 1994., Section 14.

interest." Baker v. Buckeye Cellulose Corp., 856 F.2d 167, 169 (11th Cir. 1988) emphasis in original).

As stated, Kiker's complaint raises claims under both the first amendment and the due process clause of the fourteenth amendment. Kiker, however, rests her request for preliminary injunction on only her due-process claims.

A. Claims against Judge Miller

Miller contends that Kiker's due-process claims do not have a substantial likelihood of success under the principles of issue-and-claim preclusion and because state court decisions may not be reviewed by federal district courts.

Issue-and-Claim Preclusion. As the defendants note, the doctrines of issue-and-claim preclusion are well-established legal principles. Under 28 U.S.C.A. Section 1738, the acts and judicial proceedings of any state shall have the "same full faith and credit in every court within the United States ... as they have by law or usage in the courts of the state from which they are taken." As the Supreme Court has interpreted this provision, "Section 1738 requires federal courts to give the same preclusive effect to state court judgements that those judgments would be given in the courts of the State from which the judgments emerged." Kremer v. Chemical Const. Corp., 456 U.S. 461 466, 102 S.Ct. 1883, 1889 (1983).

Applying this standard to Alabama law, federal courts evaluating claim preclusion, or res judicata, must determine whether there is (1) a prior judgment rendered by a court of competent jurisdiction, (2) the prior judgment was rendered on the merits. (3) the parties to both suits

were substantially identical or in privity and (4) the same cause of action is alleged in both actions. Thomas v. Lynn, 620 So. 2d 615 (Ala. 1993); Century 21 Preferred Properties, Inc. vs. Alabama Real Estate Commission, 401 So. 2d 764, 770 (Ala. 1981). In addition, claim preclusion applies to any issue which could have been litigated in the prior action. McGruder v. B & L Construction Co., 331 So. 2d 257 (Ala. 1976).

Issue preclusion, or collateral estoppel, "operates where the subsequent suit ... is not on the same cause of action." Wheeler v. First Alabama Bank of Birmingham, 364 So. 2d 1190, 1199 (Ala. 1978). I applies if (1) the parties in the prior action and those in the subsequent action are identical, (2) the issue is identical to one involved in the previous lawsuit, (3) the issue was actually litigated in the previous action, and (4) resolution of the issue was necessary to the prior judgment. Marshall County Concerned Citizens v. Guntersville, 598 So. 2d 1331, 1332-33 (Ala. 1992).

Kiker's due process claims against Miller can be analyzed under both claim and issue preclusion. The requirement of identity between the parties is satisfied since they were both parties to the original suit. Similarly, the prior judgment was obviously rendered by a court of competent jurisdiction on the merits. What is in dispute for claim-preclusion purposes is whether the same causes of action were present in both suits, and, for issue-preclusion purposes, whether the issues in this suit are identical to those involved in the prior action, were actually litigated, and were necessary to the resolution of the prior judgment.

With respect to claim preclusion, Kiker argues that, because Judge Miller prohibited her from raising her due-process claims and because the Alabama Supreme Court did not expressly address these claims in her appeal, her due process claims should not be estopped. Even if Kiker was obstructed in her efforts to raise various claims during her show-cause hearing, this is beside the point. Since the show-cause hearing was an administrative hearing and not a state-court proceeding, it is not properly entitled to the preclusive effect that an actual state-court judgment would receive; indeed, Miller makes no attempt to attach any preclusive effect to the show-cause hearing. Rather, the central issue is whether Kiker raised or could have raised her due-process claims on her appeal before the Alabama Supreme Court, and it is clear that the answer is yes. See Webb v. State of Alabama, 850 F.2d 1518, 1520 (11th Cir. 1988) ("a state's judicial affirmance of an administrative ruling is entitled to preclusive effect"). Kiker's brief before the Alabama Supreme Court specifically raised and discussed in detail both her procedural and substantive due process claims.[5]

Similarly, issue preclusion bars her due-process claims. While the Alabama Supreme Court did not expressly address either substantive or procedural due process, this omission cannot be read as a failure to evaluate Kiker's constitutional arguments. The Alabama Supreme Court could not have affirmed Kiker's dismissal without either rejecting the

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[5] Alabama Supreme Court Brief of Carol Kiker at 13-36. The sole exception is Ferrell's "conduct" during Kiker's show-cause hearing. Kiker contends that this issue could not have been raised on appeal because the record from the hearing contains no reference to Ferrell's role. But even if this is correct, Kiker's counsel at the hearing waived the issue on his own volition by

applicability of constitutional due process, or alternatively, accepting its applicability but concluding that it had been satisfied. In either event, the question of whether Kiker received adequate constitutional due process was an issue whose resolution was necessary to the final judgment.

Rooker-Feldman Doctrine. It may well be that, as Kiker suggests, the Alabama Supreme Court erred in its assessment of her due-process claims. But the United States Supreme Court, and not a federal district court, is the only body that can correct a state's highest court on matters of federal law. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303 (1983), and Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149 (1923). As the Supreme Court stated in Rooker,

> "Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the (state-court) judgment for errors ... T o do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original."

263 U.S. at 416, 44 S.Ct. at 150 (citations omitted). In Feldman, the Court further explained that federal district courts lack jurisdiction over state-court judgments as long as the federal law claims are "inextricably intertwined" with the state court's judgment. 460 U.S. at 486-87, 103 S.Ct. at 1317.

Kiker relies on an exception to the Rooker-Feldman doctrine recognized in Wood v. Orange County, 715 F.2d 1543 (11th Cir. 1983), cert. denied, 467 U.S. 1210, 104 S.Ct. 2398 (1984). In Wood, the court held that the Rooker-Feldman doctrine does not apply when litigants did

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failing to make a showing of what was procedurally offensive about Ferrell's

not have a reasonable opportunity to raise their constitutional claims before the state court. Id. At 1547-49. The plaintiffs in Wood had been assessed a lien against their property for the value of services rendered by a public defender. At the time they signed the affidavit entitling them to defender services, they also signed a clause waiving their notice of any lien proceedings. As a result, the Wood plaintiffs were not notified of the lien proceedings, and missed the time for appeal allotted by state law.[6] The Wood court concluded that the Rooker-Feldman doctrine did not apply because the plaintiffs had been deprived of an opportunity to attack the lien on appeal. Id. At 1548. Wood, however, is distinguishable from the present case in a crucial respect. The Wood plaintiffs, unlike, Kiker, were precluded from raising their due-process claims on appeal. Therefore, the federal district court which entertained their claims was not reviewing the prior judgment of a state appellate court.

In contrast, finding in Kiker's favor on her due-process claims would require this court to sit in an appellate capacity. The court would have to conclude that Kiker was owed more than the amount of due process that the Alabama Supreme Court held was appropriate for court-appointed registers of equity, and to reach this conclusion would require holding that the state's highest court erred on a matter of federal law. Therefore, Kiker's efforts to revive her due-process claims are an appeal by another name, and the Rooker-Feldman doctrine precludes federal courts from

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conduct and thus to preserve it for appeal.

[6] The Wood decision also addressed another issue in apposite to the present case. The court ruled that, although the Wood plaintiffs failed to take advantage of a state procedural rule allowing collateral attack of a state court judgment, the Rooker-Feldman doctrine does not impose an exhaustion of remedies requirement. Wood 715 F.2d at 1548.

exercising such reviewing power. See, e.g., Williams v. Adkinson, 792 F.Supp. 755, 761-66 (M.D. Ala. 1992) Thompson, J.), aff'd, 987 F2d. 774 (11th Cir. 1993) (table).

B. Claims against Attorney Ferrell

It is unclear just what the nature of Kiker's due-process claims are against Ferrell. In her complaint, she merely alleges that Ferrell "acted in concert" with Judge Miller.[7] It is also unclear whether Kiker seeks preliminary injunctive relief from Ferrell. However, if she does, such relief must be denied. First, Ferrell cannot be the basis for any injunctive relief because he holds no official position in the Russell County Circuit Court; and injunction against him requiring the reinstatement of Kiker would be meaningless.

Second, although Ferrell was not a named party to the state litigation, claim preclusion and issue preclusion still bar Kiker from pursuing her due-process claims against him. As to claim preclusion or res judicata, no on disputes, as previously stated, that the two requirements of a prior judgment by a court of competent jurisdiction on the merits are also satisfied. The only question is whether the other two requirements of mutuality---substantial party identity or privity---and same causes of action are met. Alabama law appears to be in flux regarding the mutuality requirement for claim preclusion. Compare Dairyland Ins. Co. v. Jackson, 566 So 2d 723, 725 (Ala. 1990), with Thomas v. Lynn, 620 So. 2d 615, 617 (Ala. 1993). Nevertheless, although there does not appear to be a state case directly on point, this court believes that the Alabama Supreme Court would find that mutuality was satisfied in this

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7 Complaint filed on January 18, 1994, Section 14.

case. The test for the substantial identity or privity of parties focuses on "identity of interest." See, e.g., Alabama Farm Bureau Mutual Casualty Ins. Co. v. Moore, 349 So. 2d 1113, 1115 (Ala. 1977); Winston v. Westfeldt, 22 Ala. 760 771 (1853). Here, Kiker contends that Miller, in his capacity as a circuit judge, and Ferrell, acting in concert with Miller, denied her due process. Without Miller's actions, therefore, Kiker would have not claim against Ferrell; that is, Ferrell, as a privately practicing attorney, could not discharge Kiker and thus, acting alone, could not have denied Kiker any of her due-process rights. Therefore, for purposes of Kiker's efforts to regain her job, Ferrell cannot be separated from Miller and thus the identity between the two men is essentially the same. Under these circumstances, the court concludes that the requirement of substantial identity or privity is satisfied for preclusion purposes.[8] See, e.g., Century 21 Preferred Properties, Inc., 401 So. 2d at 770. Finally, the last requirement for claim preclusion is met because the same causes

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[8] The Alabama Supreme Court has written that the "party identity criterion of res judicata does not require complete identity, but only that the party against whom judicata is asserted was either a party or in privity with a party to a prior action." Dairyland, 566 So 2d at 725 (emphasis added). The court thereby implied that the party seeking the benefit of res judicata need not have been a party to the prior action. In Dairyland, Leroy Jackson was a defendant in one case and a plaintiff in the second. Although the other parties to the two cases were different, the Alabama Supreme Court held that "the party identity criterion was met" because "Jackson was a party to both actions, and is the party against whom res judicata was asserted." Here, similarly, although Ferrell was not a named party to the state action, the party identity criterion could still be arguably met under Dairyland because Kiker was a party to the state action, is a party to this federal action, and is the party against whom res judicata is asserted. This court declines to rely on Dairyland, however. In Thomas, 620 So.2d at 617, the Alabama Supreme Court strongly questioned the continued validity of Dairyland's substantial relaxation of the mutuality requirement--to the extent

of action were alleged in both the state case and this federal case--that is, Kiker's due-process claims; by charging that Miller and Ferrell acted in concert in violating her rights to due process, Kiker necessarily invoked the same due-process based arguments.

Alabama law is similarly in a flux with regard to the mutuality requirements for issue preclusion. See Commentary, Issue Preclusion in Alabama, 32 Ala. L. Rev. 500 (1981) (cited with approval in Whisman v. Alabama Power Co., 512 So. 2d 78, 81 (Ala. 1987)). Nevertheless, of the many scenarios in which the mutuality requirement could be considered satisfied, the one presented here is most likely to satisfy the Alabama Supreme Court. As previously shown, there is substantial identity and privity between Ferrell and Miller. See, e.g., Interstate Electric Co. v. Fidelity & Deposit Co. of Maryland, 153 So. 427, 429 (1934) (a non-party defendant may assert issue preclusion whenever the "defendant's responsibility is necessarily dependent upon the culpability of another ... in an action brought against him by the same plaintiff for the same act") (quoting Portland Gold Mining Co. v. Stratton's Independence, 158 F. 63, 68-69 (8th Cir. 1907); see also Constantine v. United States Fidelity and Guaranty Co., 545 So.2d 750, 756 (Ala. 1989) (Hornsby, C.J., dissenting) (acknowledging that Alabama courts have applied issue preclusion where "the liability of the dependent is altogether dependent upon the culpability of one exonerated in a prior suit, upon the facts, when sued by the same plaintiff") (quoting Interstate Electric, 153 So. At 429). In addition, of the many and varied uses of "offensive" and "defensive" collateral estoppel recognized in other jurisdictions and in

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judgments can bind persons not substantially identical or in privity--for res

legal literature as exceptions to the mutuality requirement, the one presented here--where A has affirmatively and unsuccessfully asserted a claim against B and later is attempting to assert the same claim against C in a different lawsuit--has been described as the most compelling case for the application of collateral estoppel or issue preclusion under existing Alabama law. See Commentary, Issue Preclusion in Alabama, 32 Ala. L. Rev. at 527. Moreover, for the same reasons that the other requirements for issue preclusion are satisfied as to Kiker's due-process claims against Miller, these requirements are also met as to her due process claims against Ferrell.

In any event, irrespective of the direction the Alabama Supreme Court may ultimately take on issue and claim preclusion, Kiker is still not entitled to preliminary injunctive relief as to Ferrell under another preclusive concept: the Rooker-Feldman doctrine. Admittedly, Ferrell was not a party to the decision by the Alabama Supreme Court against Kiker. Still, what Kiker seeks in her claims against Ferrell is to overturn the Alabama Supreme Court's holding that her due-process rights were not violated and that she is not entitled to reinstatement. As stated earlier, this court lacks such appellate authority. See, e.g., Adkinson, 792 F.Supp. at 761-66 (Rooker-Feldman precluded federal suit against two defendants, one who was a party to prior state action and one who was not, where the ultimate purpose or effect of federal lawsuit was review of state-court decision).

For the above reasons, the court finds that Kiker has not shown a substantial likelihood of success on the merits. Since all the requisite

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judicata.

elements must be present before a preliminary injunction can issue, the court need not address the other elements.

Accordingly, it is ORDERED that the motion for a preliminary injunction, filed by plaintiff Carol Kiker on January 18, 1994, be and it is hereby denied.

DONE, this the 21st day of March, 1994.

/s/ Myron Thompson
UNITED STATES DISTRICT JUDGE

THE STATE OF ALABAMA----------JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
NOVEMBER 5, 1993

1920702

Carol Kiker, Register, 26th Judicial Circuit v. Hon. Paul J. Miller, Jr., Judge, 26th Judicial Circuit (Russell: CV 92-5040)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

PER CURIAM - MADDOX, ALMON, SHORES, HOUSTON, STEAGALL AND INGRAM, JJ.,

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a true and correct copy of the instrument(s) herewith set out as same appears(s) of record in said Court.
Witness my hand this 5th day of Nov. 1993.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

RELEASED

Aug 20 1993
Clerk
Supreme Court of Alabama

STATE OF ALABAMA--JUDICIAL DEPARTMENT
THE SUPREME COURT
SPECIAL TERM 1992-93

1920702

Carol Kiker, Register, 26th Judicial Circuit v. Hon. Paul J. Miller, Jr., Judge, 26th Judicial Circuit; Appeal from Russell Circuit Court, CV 92-5040

PER CURIAM.
AFFIRMED. NO OPINION.

See Rule 53(a) (1) and (a) (2) (A), Ala.R.App.P.

Maddox, Almon, Shores, Adams, Houston, Steagall, and Ingram, JJ., concur.

IN THE MATTER OF: CAROL KIKER, REGISTER 26TH JUDICIAL CIRCUIT	)	IN THE CIRCUIT COURT OF
	)	
	)	RUSSELL COUNTY, ALABAMA
	)	
	)	CASE NO. 92-5040

ORDER

This cause comes before the Court on the order to show cause, answer thereto as amended, and testimony taken ore tenus. Upon consideration thereof, the Court finds as follows:

1. That exhibits 9 and 9a offered in evidence by the Register are admitted.

2. That although the Supreme Court previously noted it was not necessary that a show cause hearing be conducted by this Court, the Court, nevertheless, felt the Register should be given an opportunity to assert for the record why the files herein under consideration were treated differently form others, but no substantial or material evidence to such effect was forthcoming from the Register or on her behalf.

3. That in hundreds of cases of a similar nature to that filed in Case No. DR 89-268.01 involving Michael D. Kiker, stepson of the Register and son of the Clerk of this Court, and Case No. DR 92-190 involving Ronald P. Kiker son of the Register and stepson of the Clerk of the Court, hearing dates were set by the Register's office and submitted back to the office of the District Attorney with a hearing date within a two to three week period; however the two cases under consideration were the

only ones which were not processed is such way and which were not scheduled for a hearing before the proper judge.

4. That, in fact Case No. DR 89-268.01 involving Michael D Kiker son of the Clerk of this Court and stepson of the Register, was never submitted to a judge for a hearing even though it was in the Register's and Clerk's office for a period of some four months.

5. That in case No. DR 92-190 involving Ronald P. Kiker the complaint was stamped in and dated, but this case not given a file number or assigned to a Judge until Ronald P. Kiker filed a complaint for divorce and petition for modification of divorce judgment. At that time, the register opened a new file (DR 92-191) and assigned consecutive case numbers to these cases.

6. That both of the petitioners, former daughters-in-law of the Register and Clerk of this Court, suffered monetary losses in child support and potential deprivation of medical care of their children since these cases were not treated in the ordinary course of business.

7. That the Register failed to endorse the true date of filing on certain of the pleadings received by her in her office pursuant to Section 12-17-115 of the Code of Alabama.

8. That the Register was guilty of wilful negligence of duty and the intentional omission of an act of duty in the cases under consideration.

9. That the integrity of the entire judicial system is seriously affected when officers of the court system deprive people of the right to due process or show favoritism to members of their family. The judicial system cannot condone such conduct.

Upon consideration of the findings of fact, it is, therefore, ordered by the Court that Carol Kiker be and she is hereby removed as Register of the 26th Judicial Circuit Court of Russell County, Alabama upon good cause shown, to be effective immediately.

It is further ordered by the Court that the Clerk of this Court enter a copy of this Order and a copy of the original Order to Show Cause in this case, on the minutes of this Court in accordance with Rule 79(b) of the Alabama Rules of Civil Procedure.

The Clerk is also directed to serve all the judges and the District Attorney of this Circuit, the Administrative Office of Courts, and the attorneys, via 1st Class Mail, with copies of this Order.

DONE this the 16th day of February, 1993.

/s/ Paul J. Miller, Jr.

SUPREME COURT OF ALABAMA
OCTOBER TERM, 1992-93

1920003

EX PARTE CAROL KIKER

PETITION FOR WRIT OF MANDAMUS, OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION

(Re: In the matter of Carol Kiker, register of the 26th Judicial Circuit)

(Russell Circuit Court, CV 92-5040)

PER CURIAM.

Carol Kiker, the register of the 26th Judicial Circuit, petitions this Court for a writ of mandamus or prohibition directed to the Honorable Paul J. Miller, Jr., the presiding judge of the 26th Circuit. Judge Miller ordered Mrs. Kiker to appear before him

> "to show cause why Case Nos. DR-92-190 and DR-89-268-01 were not processed in accordance with standard procedures in setting up files, setting trial/hearing dates, assigning files to the proper court and Judge in accordance with procedures followed in similar and like cases and to further show cause why you should not be removed from office. You have the right to be represented at said hearing by an attorney of your choosing, subpoena witnesses on your behalf, cross-examine any witnesses of the Court and offer any evidence you may deem proper and which is admissible. The Alabama Rules of Civil Procedure will apply at said hearing."

Judge Miller also ordered subpoenas to issue to five persons to appear as witnesses. Mrs. Kiker made a suggestion of recusal, but Judge Miller refused to recuse himself. Pursuant to the district attorney's request, an assistant attorney general, Donald G. Valeska II, was appointed to conduct the proceedings.[1] Mrs. Kiker filed a notice of taking depositions of three of the witnesses named in the order to show cause, but Mr. Valeska filed a motion to quash the notice of taking depositions. Judge Miller granted the motion to quash. Mrs. Kiker filed this petition, requesting this Court to order Judge Miller to recuse himself and to enter an order permitting discovery to go forward.

The position of register was abolished by the Judicial Article Implementation Act, Ala. Acts 1975, No. 1205, s 7-109, with sitting registers allowed to remain in office under specified conditions. That provision is codified at Ala. Code 1975, s 12-17-110:

> "s 12-17-110. Office of register not to be filled when vacancy occurs; reappointment of registers holding office on October 10, 1975; removal of registers.
>
> "(a) Vacancies. When the position of register in any circuit court becomes vacant upon the death, resignation, retirement or inability of the incumbent to satisfy the conditions for reappointment specified in subsection (b) of this section, the vacancy shall not be filled, and the responsibilities and authority of the register shall become the responsibilities and authority of the clerk of the circuit court for the county where the register served.
>
> "(b) Reappointment. A register who:

---

[1] In his request to the attorney general, the district attorney recited that he was a close personal friend of Mrs. Kiker and that one of the witnesses was an assistant district attorney.

"(1) Holds office on October 10, 1975, and

"(2) Is not eligible to retire and receive retirement compensation by reason of age and years of service or by provision of any retirement program in effect on January 17, 1977, may be reappointed for terms of six years, but no register shall be reappointed after completion of any term during which he becomes eligible to retire and receive retirement compensation; provided, that a register who becomes eligible to retire during a term shall be eligible to reappointment by the presiding judge of his circuit for not more than six additional terms of one year each; and provided further, that until such time as the register becomes eligible to retire and receive retirement compensation, reappointment shall be automatic unless a majority of the circuit judges within the circuit, or by unanimous agreement where there are only two circuit judges, file a written declaration with the administrative director of courts stating that the register shall not be reappointed. At such time, the office shall be deemed vacant under subsection (a) of this section.

"(c) Removal. The register shall be subject to removal by the judge who appointed him for cause by order to be entered at length on the minutes of the court."

Mrs. Kiker was appointed on October 3, 1975, and was reappointed in 1982 and 1988. During the summer of 1992, two domestic relations cases were filed in which her son and her stepson were parties. These are the cases referenced in the show cause order as quoted above. We see no need to detail the circumstances and allegations shown in the materials submitted in support of and in opposition to the petition before us. Mrs. Kiker asserts that Judge Miller is biased against her and has expressed, both in public and in writing to her, fixed opinions that she has improperly executed her office. It is on this basis that she seeks Judge Miller's recusal.

A petition for a writ of mandamus is the proper means to seek review of a ruling on a suggestion of recusal. Ex parte Melof, 553 So.2d 554, 555 (Ala.1989). Mrs. Kiker argues that she is entitled to an impartial decision-maker for a determination of whether she is subject to removal for cause.

As we read s 12-17-110(c), Judge Miller is empowered to dismiss Mrs. Kiker for cause simply by entering on the minutes his basis for doing so.[2] "The register shall be subject to removal by the judge who appointed him for cause by order to be entered at length on the minutes of the court." Nothing in this provision requires Judge Miller even to hold a hearing, so the order to show cause grants her more rights than she is entitled to by statute. If Judge Miller had simply entered on the minutes a recitation of the facts that had come to his attention, she would have had no opportunity to suggest his recusal.[3] Therefore, we can see no basis for requiring him to recuse himself from the hearing that he has provided over and above the statutory requirement.

Two judges serve the 26th Judicial Circuit. The materials before us include an affidavit of the other judge, the Honorable Wayne T. Johnson, in which Judge Johnson states that he views "the overall supervision of

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[2] Two judges serve the 26th Judicial Circuit. The materials before us include an affidavit of the other judge, the Honorable Wayne T. Johnson, in which Judge Johnson states that he views "the overall supervision of the Register and other administrative functions of this Circuit as within the responsibilities of the Presiding Judge," Judge Miller.

[3] In both Batson v. State ex rel. Pond, 206 Ala. 316, 89 So. 500 (1921), and Fortson v. Hawkins, 294 Ala. 718, 321 So. 2d 196 (1975), this court overturned decisions to remove registers, so Mrs. Kiker is protected from removal for insufficient cause.

the Register and other administrative functions of this Circuit as within the responsibilities of the Presiding Judge," Judge Miller.

In both Batson v. State ex rel. Pond, 206 Ala. 317, 89 So. 500 (1921), and Fortson v. Hawkins, 294 Ala. 718, 321 So.2d 196 (1975), this Court overturned decisions to remove registers, so Mrs. Kiker is protected from removal for insufficient cause.

In this matter, Judge Miller is acting administratively under s 12-17-110(c) and under his duty, as presiding circuit judge, "to exercise a general supervision of the judges, clerks, registers, ... and other court employees of the circuit and district courts within the circuit ... and see that they attend strictly to the prompt, diligent discharge of their duties." Ala. Code 1975, s 12-17-24. An administrative act in the exercise of such supervision does not involve a "proceeding" as to which the disqualification standards of Canon 3 C. apply. Canons of Judicial Ethics, Canon 3 C.

Therefore, Judge Miller is not required in this matter to meet the standards of impartiality set out in Canon 3 C.; cf. Canon 3 B., regarding a judge's administrative responsibilities.

Regarding the request for discovery, we see no basis for granting the petition for the writ of mandamus. As we said above, Judge Miller is not required by statute to hold a show cause hearing. He does not have to allow discovery simply because he has granted Mrs. Kiker the opportunity to present her case in such a hearing. Furthermore, the fact that he stated in the show cause order that the Rules of Civil Procedure would apply "at said hearing" does not mean that she is entitled to prehearing discovery. Because Mrs. Kiker has not shown a clear right to

an order requiring Judge Miller's recusal or requiring that he allow discovery, her petition for a writ of mandamus is denied.

WRIT DENIED.

Almon, Shores, Adams, Houston, and Steagall, JJ., concur.

ALMON, SHORES, ADAMS, HOUSTON and STEAGALL, JJ., concur.

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Supreme Court, U. S.
FILED
JAN 23 1998
CLERK

No. 97-910

In The

Supreme Court of the United States

October Term, 1997

CAROL KIKER and DEVON KIKER,

Petitioners,

v.

PAUL J. MILLER, JR., individually and as Circuit Judge of the Circuit Court of Russell County; and JOHN PELHAM FERRELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT JOHN PELHAM FERRELL'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. Whether the United States Court of Appeals for the Eleventh Circuit properly upheld the district court's order dismissing Carol Kiker's claim under 42 U.S.C. § 1983 that Pelham Ferrell, a private attorney, engaged in a conspiracy to deny Carol Kiker her due process rights in removing her as Register of the Circuit Court of Russell County.

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Kiker v. Miller, Case No. CV-T-056-E (M.D. Ala., Mar. 21, 1994) (Unpublished order dismissing due process claims) (see Petitioner's App. 12-13).

Related opinions and orders

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Kiker v. Miller, 629 So. 2d 815 (Ala. 1993) (Table) (affirming order removing Carol Kiker as Register)

Ex parte Kiker, 612 So. 2d 453 (Ala. 1993) (denying writ of mandamus seeking Judge Paul J. Miller's recusal)

JURISDICTION

This petition seeks review of the Eleventh Circuit Court of Appeals' opinion denying the petition for rehearing and suggestion of rehearing en banc filed by Carol Kiker and Devon Kiker (hereinafter referred to collectively as "Petitioners" or "the Kikers"). Petitioners cannot, as they suggest, invoke the jurisdiction of this

Court pursuant to 28 U.S.C. § 1257. Under the circumstances, the proper basis for jurisdiction in this Court is 28 U.S.C. § 1254.

STATEMENT OF THE CASE

I. Course of Proceedings Below

On January 18, 1994, Carol Kiker filed a complaint seeking declaratory, injunctive and monetary relief against defendants Judge Paul J. Miller, Jr. and John Pelham Ferrell. In her Complaint, Carol Kiker alleged that Miller and Ferrell had, *inter alia*, violated her rights to procedural and substantive due process arising from her removal from the office of Register in Equity of Russell County, Alabama.[1]

Because each of her allegations had been raised and rejected by the Alabama Supreme Court in a direct appeal from Judge Miller's removing Carol Kiker from office, both defendants moved to dismiss the complaint and filed extensive excerpts from prior state court proceedings, relying upon the doctrines of res judicata, collateral estoppel, the "*Rooker-Feldman*[2] doctrine" of federal district court non-jurisdiction over claims previously

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[1] Carol Kiker also alleged violations of her First Amendment right to free speech and association regarding "retaliation" against her for her activities in support of a pay raise for state personnel.

[2] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 416 (1923); *District of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 483 (1983).

decided by the highest courts of a state, and (by Judge Miller only) the doctrines of absolute and qualified immunity.

Following briefs and a hearing, the district court denied Carol Kiker's motion for a temporary restraining order and her request for a preliminary injunction. Petitioners' App. 14-26. To the extent they were directed to the due process claims raised in the complaint, the district court granted the defendants' motions to dismiss on March 21, 1994. Petitioners' App. 12-13.

On June 6, 1994, Carol Kiker moved to amend her complaint to allege insufficiency of state remedies regarding her purported constitutional deprivations. Also, on August 25, 1994, she attempted to reopen her procedural due process claims and requested a "name-clearing hearing" as supplemental relief.[3]

The complaint was thereafter amended to add as a party plaintiff Carol Kiker's husband, Devon Kiker, who was then (and still is) the Circuit Clerk of Russell County. This amended complaint included allegations by Devon Kiker that the Defendants had "retaliated" against him. Defendants moved to dismiss this amended Complaint and later moved for summary judgment as to all of the Kikers' remaining claims. The district court allowed the Kikers' motion to amend the complaint but on the same day ruled in favor of both defendants with respect to Devon Kiker's claims as amended. Petitioners' App. 5-11.

---

[3] These requests were subsequently denied. A later request that the district court judge recuse himself was also denied.

This ruling effectively dismissed Devon Kiker as a plaintiff in this action.

On November 29, 1996, the district court ruled in favor of Ferrell and against Carol Kiker on his motion for summary judgment, and Ferrell was dismissed from the case. Petitioners' App. 4. Carol Kiker's motions for permission to appeal several nonfinal orders entered by the district court were subsequently denied.

The only remaining claim, in which Carol Kiker alleged that Judge Miller had retaliated against her because she had exercised her First Amendment rights, was tried before a jury over four days in April 1996. The jury returned a verdict in favor of Judge Miller, finding that Carol Kiker had failed to prove by a preponderance of the evidence that her activities regarding a pay raise for state personnel were a motivating factor in her firing. Respondent's App. 1-2.

The Kikers' Notice of Appeal was filed in the district court on May 10, 1996. On March 7, 1997, The United States Court of Appeals for the Eleventh Circuit entered an order affirming the district court. Petitioners' App. 3. The Kikers' petition for rehearing and suggestion of rehearing en banc was denied on September 2, 1997. Petitioners' App. 1-2. The Kikers thereafter filed a petition for writ of certiorari in this Court.

II. Statement of the Facts

This appeal is based upon a bitter dispute between a disgruntled state employee against the official who had the statutory power to remove her from her position, a

dispute which has unfortunately ensnared a former private attorney practicing in Russell County, Alabama. Carol Kiker is the former "Register in Equity" of Russell County, Alabama, a position that was prospectively abolished upon Alabama's procedural merger of law and equity cases in circuit court. *See generally* Ala. Code § 12-17-110 (1995), Ala. R. Civ. P. 1, 3. Carol Kiker was appointed to this position prior to the abolition of her office, and thus the position of Register in Russell County continued to exist under a grandfathering provision that allowed for Alabama's Registers holding office on October 10, 1975, to remain in office by a "negative reappointment" mechanism until their eligibility for retirement compensation. Ala. Code § 12-17-110(a), (b) (1995). Registers under Alabama law are "subject to removal" by their respective circuit judges "for cause by order to be entered at length on the minutes of the court." *Id.* (c).

Defendant Judge Paul J. Miller is the Presiding Judge of the Circuit Court of Russell County, and the official possessing supervisory authority over Carol Kiker. Ala. Code § 12-17-24 (1995). Defendant Pelham Ferrell is an attorney formerly in private practice (now retired) in Russell County who has been named as Judge Miller's "co-conspirator" in this action.

In 1992, the Russell County District Attorney's office filed certain motions in an ongoing domestic relations case, styled *Michael Devon Kiker v. State of Alabama ex rel. Lisa M. Hutchinson*, DR 89-268.01. The defense motions sought a change in the collection site of child support payments owed by Michael Devon (Mickey) Kiker, Carol Kiker's step-son, as well as an increase in child support and reimbursement for medical bills. The collection site

motion was filed on March 2, 1992; however, contrary to usual practice in Russell County, the motion was not assigned a judge and a court date within three to five days, and the D.A.'s office filed a motion to set a hearing on April 1, 1992. The motions for additional child support and for medical reimbursement were filed by April 8, 1992. No court date on these motions was ever assigned until the parties had reached an agreement on a proposed order.[4] At that time, state's counsel hand-delivered the file to a judge's office for a ruling.

Similarly, the District Attorney's office became involved in the enforcement of a Georgia divorce decree dissolving the marriage of Patricia Sue Kiker and Paul Kiker (Carol Kiker's son). Sue Kiker requested the assistance of the Department of Human Resources in enforcing her divorce decree, and the D.A.'s office filed a rule nisi complaint on Sue Kiker's behalf on April 24, 1992. A separate complaint for divorce filed by the husband, Paul Kiker, was received by the D.A.'s office on May 14, 1992; although Sue Kiker's filing occurred some two to three weeks prior to Paul Kiker's filing, both were assigned sequential case numbers, DR 92-190 and DR 92-191. In fact, in the normal course of affairs in the Register's office, between two and ten file numbers should have been interposed each day between the filing of the two actions. The delay in having a court date immediately set

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[4] The lack of a court date worked to dissuade the contestants from settling their differences regarding the child support matters involved; in contrast, parties to such motions generally settle their differences more quickly when a court date has been set.

for hearing Sue Kiker's action disadvantaged her by delaying the relief requested in her complaint, i.e., enforcement of the Georgia divorce decree.

After Judge Miller became aware of the handling of these files by the Register's office, he consulted two Phenix City attorneys, Pelham Ferrell and Buster Landreau, concerning the legal question whether a Register could be removed simply by an entry of an order of the court entered on the minutes of the court or whether a hearing should be afforded. Ferrell understood Judge Miller to be considering Carol Kiker's removal because of the extensive newspaper publicity and contacts made by Carol Kiker's former daughters-in-law with Judge Miller, although Ferrell was never given specific information as to the motive for Judge Miller's request. Ferrell informed Judge Miller that it would be better for Judge Miller to grant a hearing comporting with the basic tenets of due process.

Judge Miller thereafter ordered Carol Kiker to show cause why DR 92-190 and DR 89-268-01 (Carol Kiker's son's and stepson's cases) were not processed in accordance with standard procedures and why she should not be removed from office. The show cause order set a specific hearing date, and stated that the Alabama Rules of Civil Procedure would apply at the hearing to show cause. Ferrell, the alleged "co-conspirator", had nothing to do with the issuance or wording of this order, nor did he have any influence upon Judge Miller's adverse decisions on Carol Kiker's recusal and discovery motions. Carol Kiker's motions seeking recusal and pre-hearing deposition testimony were denied, and the denial was upheld by the Alabama Supreme Court on mandamus. *Ex*

parte Kiker, 612 So. 2d 453 (Ala. 1993) (Petitioners' App. 32-37).

The show cause hearing was held in open court on February 9, 1993, and Judge Miller asked Ferrell to attend the hearing, not in any official capacity but simply as Judge Miller's long-time friend. Although there is a dispute as to whether Ferrell nodded or made physical motions in Judge Miller's direction, it is undisputed that Ferrell did not advise Judge Miller about evidentiary rulings or the sufficiency of the proof to warrant Carol Kiker's dismissal. In any event, any such physical motions on the part of Ferrell did not affect any of Judge Miller's rulings at the hearing.

Ferrell became aware for the first time of Judge Miller's decision to dismiss Carol Kiker when he saw a draft order that Judge Miller requested he review. Ferrell noted that the draft contained the words "ore tenus in open court," and advised Judge Miller that placing "open court" and "ore tenus" together would be redundant. This was the entire extent of "co-conspirator" Ferrell's participation in the show cause proceedings.

Judge Miller executed an order on February 16, 1993, removing Carol Kiker from the office of Register of Russell County. Petitioners' App. 29-31. This order contained the following pertinent findings:

> 2. That although the Supreme Court previously noted it was not necessary that a show cause hearing be conducted by this Court, the Court, nevertheless, felt the Register should be given an opportunity to assert for the record why the files herein under consideration were

treated differently from others; but no substantial or material evidence to such effect was forthcoming from the Register or on her behalf.

3. That in hundreds of cases of a similar nature to that filed in Case No. DR 89-268.01 involving Michael D. Kiker, stepson of the Register and son of the Clerk of this Court, and Case No. DR 92-190 involving Ronald P. Kiker, son of the Register and stepson of the Clerk of this Court, hearing dates were set by the Register's office and submitted back to the office of the District Attorney with a hearing date within a two to three week period; however the two cases under consideration were the only ones which were not processed in such way and which were not scheduled for a hearing before the proper Judge.

4. That, in fact Case No. DR 89-268.01 involving Michael D. Kiker, son of the Clerk of this Court and stepson of the Register, was never submitted to a Judge for a hearing even though it was in the Register's and Clerk's office for a period of some four months.

5. That in Case No. DR 92-190 involving Ronald P. Kiker the complaint was stamped in and dated, but this case was not given a file number or assigned to a Judge until Ronald P. Kiker filed a complaint for divorce and petition for modification of divorce judgment. At that time, the register opened a new file (DR 92-191) and assigned consecutive case numbers to these cases.

6. That both of the petitioners, former daughters-in-law of the Register and Clerk of this Court, suffered monetary losses in child support and potential deprivation of medical

> care of their children since these cases were not treated in the ordinary course of business.
>
> 7. That the Register failed to endorse the true date of filing on certain of the pleadings received by her in her office pursuant to Section 12-17-115 of the *Code of Alabama*.
>
> 8. That the Register was guilty of wilful negligence of duty and the intentional omission of an act of duty in the cases under consideration.
>
> 9. That the integrity of the entire judicial system is seriously affected when officers of the court system deprive people of the right to due process or show favoritism to members of their family. The judicial system cannot condone such conduct.

Petitioners' App. 29-30.

Carol Kiker immediately filed a notice of appeal to the Alabama Supreme Court, along with other filings that in no way resembled a petition for certiorari under Rule 21 of the Alabama Rules of Appellate Procedure or under common law, as she now purports. On the contrary, Carol Kiker's actions and statements before the Alabama Supreme Court indicate that she considered herself to be an appellant pursuing an appeal rather than a petitioner seeking an extraordinary writ.

Before the Alabama Supreme Court, Carol Kiker repeatedly alleged and argued as her principal issues that Judge Miller's actions deprived her of procedural and substantive due process. However, despite her allegations of constitutional infirmities in her removal, the Alabama Supreme Court affirmed Carol Kiker's removal, citing

Rules 53(a)(1) and 53(a)(2)(A), Ala. R. App. P. *Kiker v. Miller*, 629 So. 2d 815 (Table) (Ala. 1993) (per curiam) (See Petitioners' App. 28). On the same day, the Alabama Supreme Court issued its "Certificate of Judgment of Affirmance," which provided as follows:

> The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the Court below is affirmed.

Respondent's App. 3.

Carol Kiker's application for rehearing (which raised the same constitutional issues) was overruled by the Alabama Supreme Court. *Kiker v. Miller*, 639 So. 2d 961 (Table) (Ala. 1993) (per curiam) (See Petitioners' App. 27). The Kikers did not petition this Court for a writ of certiorari based on the Alabama Supreme Court's order, but instead sought relief in federal district court.

STANDARD OF REVIEW AND SUMMARY OF THE ARGUMENT

I. Standard of Review

Petitioners request this Court to review the Eleventh Circuit's denial of a petition for rehearing and suggestion of rehearing en banc regarding Carol Kiker's due process claims, which were dismissed by the district court and affirmed on appeal.[5]

[5] Although Petitioners appealed the district court's order dismissing Devon Kiker's claims, they have apparently chosen

In so doing, Petitioners raise federal questions as to the applicability of Alabama's law of collateral estoppel and res judicata, as well as the *Rooker-Feldman* doctrine. These questions of state and federal law are subject to *de novo* review in the courts of appeals. *O'Reilly v. Ceuleers*, 912 F.2d 1383, 1385 (11th Cir. 1990); *Salve Regina College v. Russell*, 499 U.S. 225, 232 (1991). Appellate review is also guided by the application of the harmless error doctrine, which mandates that a reviewing court give judgment "without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (1988). In this Court, "[r]eview on a writ of certiorari is not a matter of right but of judicial discretion," which "will be granted only for compelling reasons." Rule 10, Rules of the Supreme Court. Petitioners have offered no compelling reasons for the exercise of this Court's discretion.

II. Summary of Argument

The only issue preserved for this Court relating to Respondent Pelham Ferrell is whether Ferrell acted jointly and/or in concert with Judge Miller to deprive Carol Kiker of procedural due process rights in connection with her removal as Register.[6]

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not to raise any issues related to those claims in this Court. (See Petitioners' Brief, pp. i, 6, 7, 11, 12, 14, 15).

[6] See previous footnote.

On state appellate review (not certiorari review as the Kikers now contend), the Alabama Supreme Court previously ruled that Carol Kiker's show cause hearing before Judge Miller comported with constitutionally mandated procedural due process guarantees, and it rejected Carol Kiker's contentions to the contrary. Carol Kiker's civil rights conspiracy claims against Ferrell alleging that he "acted in concert" to deprive her of procedural due process during her show cause hearing are thus foreclosed by the judgment of the Alabama Supreme Court, both by virtue of the Alabama doctrines of res judicata and collateral estoppel and by the *Rooker-Feldman* doctrine, and were correctly dismissed by the district court.

ARGUMENT

CAROL KIKER'S PROCEDURAL DUE PROCESS CLAIM WAS PROPERLY DISMISSED

Following the demise of her First Amendment retaliation claims against Judge Miller as a result of the jury's verdict in the district court,[7] Petitioners sought Eleventh Circuit review of, *inter alia*, the district court's March 21, 1994 order dismissing Carol Kiker's due process claims against both defendants on the basis of claim and issue

[7] Indeed, Petitioners failed to raise any issues regarding the soundness of the jury's verdict, which destroys any conceivable basis for concluding that Carol Kiker's dismissal as Register was motivated by her exercise of First Amendment rights, i.e., her lobbying for a judicial pay raise. Similarly, Plaintiffs have not challenged on appeal the district court's parallel order granting summary judgment to Ferrell on her First Amendment claims.

preclusion. Having failed to procure a favorable result in the Eleventh Circuit, Petitioners desperately call upon this Court to grant a writ of certiorari based on arguments which have been exhaustively briefed, considered, and rejected in each court to which Petitioners have resorted.

While Carol Kiker, and later both the Kikers, contended in their complaint as amended that Miller's dismissal of Carol Kiker as Register violated both procedural and substantive due process rights, the Kikers conceded below (Petitioners' Brief to the Eleventh Circuit, p. 30) that their substantive due process claim is precluded by *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), *cert. denied*, 114 S. Ct. 898 (1995).[8] Moreover, although Petitioners raised various issues relating to Devon Kiker's claims in their brief to the Eleventh Circuit, they have apparently chosen not to pursue those issues in their petition to this Court.

Thus, the sole potentially viable claim Petitioners have preserved for this Court's review is Carol Kiker's allegation that her dismissal violated procedural due process under the Fourteenth Amendment to the United States Constitution. However, as will be demonstrated,

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[8] In *McKinney*, the Eleventh Circuit stated that "areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because substantive due process rights are created only by the Constitution." *McKinney*, 20 F.3d at 1554 (internal quotations omitted).

her procedural due process claim has been fully considered and rejected outright by the Alabama Supreme Court. Therefore, as the district court correctly ruled, these claims are now unreviewable by any federal court, Petitioners having failed to challenge the Alabama Supreme Court's 1993 decision by filing a timely petition for writ of certiorari to this Court. Petitioners back-door attempt to procure further review of issues long ago put to rest by the Alabama Supreme Court must fail. Therefore a writ of certiorari is not warranted in this case.

A. The District Court Lacked Subject-Matter Jurisdiction Over Carol Kiker's Procedural Due Process Claim.

A federal district court is without authority to review final determinations of the highest court of a state; review of such determinations may only be obtained in the United States Supreme Court. *See* 28 U.S.C. § 1257 (1988); *Rooker v. Fidelity Trust Co.*, 263 U.S. at 415, 416; *District of Columbia Ct. of App. v. Feldman*, 460 U.S. at 483. The *Rooker-Feldman* doctrine extends to reach not only a *direct* review of a state court determination of state law, but also *collateral review* of state judicial proceedings in which state tribunals decide federal constitutional questions in a manner that is inextricably intertwined with a decision not to grant relief to a petitioning litigant. *Feldman*, 460 U.S. at 483-84 n. 16, 486-87; *Wood v. Orange County*, 715 F.2d 1543 (11th Cir. 1983); *Williams v. Adkinson*, 792 F. Supp. 755, 762 (M.D. Ala. 1992), *aff'd mem.*, 987 F.2d 774 (11th Cir. 1993).

In this case, Carol Kiker asserted deprivations of procedural due process rights in connection with her show cause hearing and pre-hearing discovery that are precisely the same allegations that she unsuccessfully argued before the Alabama Supreme Court; it cannot be said that the state appellate forum did not afford a full and fair opportunity to assert all possible constitutional arguments for restoring plaintiff to office. *See Liedel v. Juvenile Ct. of Madison County, Ala.*, 891 F.2d 1542, 1545-46 (11th Cir. 1990). As the district court in this case previously noted in *Adkinson*, "this court is not a court of error for . . . the Alabama Supreme Court." 792 F. Supp. at 767. Accordingly, the district court correctly concluded that it had no jurisdiction over Carol Kiker's renewed procedural due process claims, and correctly dismissed them for lack of subject-matter jurisdiction.[9]

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[9] Petitioners' contention that Carol Kiker was due a "name-clearing hearing" (*see Buxton v. City of Plant City*, 871 F.2d 1037 (11th Cir. 1989)) was therefore necessarily foreclosed as well. As the Eleventh Circuit has noted, "A critical element of a claimed invasion of a reputational liberty interest . . . is the *falsity* of the government's asserted basis for the employment decision at issue." *Doe v. Garrett*, 903 F.2d 1455, 1461-62 (11th Cir. 1990). The Alabama Supreme Court's affirmance of the Order issued by Judge Miller precludes any dispute that Judge Miller's findings as to Carol Kiker's differential treatment of court files were in fact correct; moreover, the Alabama Supreme Court's rejection of her due process arguments bars any conclusion that Plaintiff was denied a meaningful opportunity to clear her name by showing cause for her differential treatment of the files in question.

B. Alabama's Doctrine of Collateral Estoppel Precludes Re-examination in Federal Court of Previously Determined Issues Regarding Carol Kiker's Procedural Due Process Claim.

Pursuant to 28 U.S.C. § 1738, the acts and judicial proceedings of any court of any state shall have "the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of the state from which they are taken." This federal statute has been interpreted so as to bar re-litigation in federal court of claims or issues previously determined by state courts. *E.g., Cleckner v. Republic Van & Storage Co.*, 556 F.2d 766, 769 (5th Cir. 1977); *Mays v. Brent*, 546 F.2d 1154 (5th Cir.), *cert. denied*, 434 U.S. 850 (1977); *Montana v. United States*, 440 U.S. 147, 162-64 (1979). As this Court has noted, "[s]ection 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 466 (1982). *Kremer* also dispels any notion that a judgment of a state appellate court upholding allegedly wrongful administrative action has any less preclusive effect than other judgments originating from that state's courts. 456 U.S. at 479-80 & n. 21.

As discussed in the Statement of the Facts and in the preceding argument, although Carol Kiker raised procedural due process as an issue on appeal in state court, the Alabama Supreme Court affirmed Judge Miller's dismissal order without a full written opinion. *Kiker v. Miller*, 629 So. 2d 815 (Ala. 1993) (table). Thus, because it was an Alabama appellate court which upheld Carol Kiker's dismissal, one must turn to Alabama law to determine the

preclusive effects of the judgment of the Supreme Court of Alabama that the removal of plaintiff as Register deprived her of no constitutionally protected rights.

Under Alabama law, the doctrine of collateral estoppel, or issue preclusion, is applied by Alabama courts when (1) the issue is identical to one involved in the previous suit; (2) the issue was actually litigated in the previous action; and (3) resolution of the issue was necessary to the prior judgment. *N & C Properties v. Windham*, 582 So. 2d 1044, 1046 (Ala. 1991). Two other requirements must be made with regard to the parties involved: (1) the party *claiming the benefit* of the prior judgment as an estoppel against the adversarial party is one who would have been prejudiced by a contrary decision in the previous case; and (2) *the party against whom the estoppel by judgment is sought* either was an actual party in the previous case or was in privity with, or is a successor to the rights of, an actual party in the previous case. *Constantine v. United States Fid. & Guar. Co.*, 545 So. 2d 750, 755-56 (Ala. 1989); *accord, Mitchell v. Humana Hosp.-Shoals*, 942 F.2d 1581, 1582 (11th Cir. 1991). Thus, allowing a litigant who did not participate in the former action to raise an estoppel bar "is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct suit." *Constantine*, 545 So. 2d at 755-56 (quoting *Interstate Elec. Co. v. Fidelity & Deposit Co. of Md.*, 228 Ala. 210, 153 So. 427 (1934)).

Applying Alabama principles of issue preclusion to the facts present here, it is clear that issue preclusion should apply. The Kikers called upon the district court and the Eleventh Circuit to re-examine whether Carol

Kiker was deprived of her office by Judge Miller in violation of her Fourteenth Amendment rights to procedural due process. Carol Kiker clearly raised and litigated the alleged procedural due process deprivation in her brief to the Alabama Supreme Court. Thus, these issues are identical to those before the Alabama Supreme Court on direct appeal and were actually raised and necessarily decided by that court. Moreover, Carol Kiker was clearly a named party in that action, was represented by counsel, and had a full and fair opportunity to litigate the issue raised here.

While Ferrell, the alleged "co-conspirator," was not a party to the state appeal, Carol Kiker's alleged property deprivation was her employment as Register. Defendant Ferrell is incapable of dismissing a Register at all – under Alabama law, a Register may only be terminated by a circuit judge for cause by an order entered on the minutes of the court. *See* Ala. Code §§ 12-17-110(c), 12-17-24 (1995); *Ex parte Kiker*, 612 So. 2d at 456 (mandamus proceeding resulting in opinion confirming Judge Miller's power to remove plaintiff for cause). Thus, for Ferrell to be liable in the first instance under 42 U.S.C. § 1983 for acting "under color of state law," he must necessarily have *conspired* with Judge Miller such that the latter would act to deprive Carol Kiker of her constitutional rights. *Adickes v. S.H. Kress*, 398 U.S. 144 (1970); *Sykes v. State of Cal. (Dep't of Motor Vehicles)*, 497 F.2d 197 (9th Cir. 1974); *Temple v. Albert*, 719 F. Supp. 265, 267 (S.D.N.Y. 1989).

Therefore, in bringing a § 1983 claim against Ferrell, a private actor, Petitioners necessarily claimed that Ferrell conspired with Judge Miller such that the latter would act

to deprive Carol Kiker of her constitutional rights to procedural due process. However, by claiming that a conspiracy existed between Ferrell and Miller, Petitioners pled an action clearly barred by issue preclusion under Alabama law. To prove a conspiracy under § 1983, Carol Kiker was required to plead and prove that the defendants reached an understanding to deny her certain due process rights and was also required to show *an actionable wrong* to support the conspiracy. *Bailey v. Board of County Comm'rs of Alachua County, Fla.*, 956 F.2d 1112, 1122 (11th Cir. 1992). While a conspiracy allegation may be used to furnish the requisite state action for § 1983 liability, it remains necessary to show an *actual deprivation* of a constitutional right; a mere conspiracy to deprive is insufficient. *Villanueva v. McInnis*, 723 F.2d 414, 418 (5th Cir. 1984).

The particular property interest that Petitioners claimed was the subject of due process guarantees was Carol Kiker's office as Register; indeed, the thrust of her complaint is that Judge Miller's removal of her was based on illegitimate reasons (*i.e.*, her exercise of First Amendment rights) and that said removal violated procedural due process. However, these claims have been reviewed by the Alabama Supreme Court on appeal from her dismissal and adjudged not to constitute constitutional violations. Thus, the requisite "wrong" necessary to show an actionable conspiracy was found not to exist by the state appellate court.

This finding is important with regard to both the existence of the collateral estoppel doctrine and to Ferrell's ability to take advantage of said doctrine. First, it should be noted that had the Alabama Supreme Court

found a constitutional violation and reinstated Carol Kiker to her position, this finding would have prejudiced Ferrell in that the requisite "bad act" necessary to prove a conspiracy would have been found to exist. Because Ferrell's civil rights liability, if any, must be derived from Judge Miller's official act of removing plaintiff from her position, an exoneration of Judge Miller by a court of competent jurisdiction would destroy Ferrell's derivative liability for conspiracy. Therefore, Ferrell was entitled to assert collateral estoppel against Carol Kiker under Alabama law, which he did in the district court, the Eleventh Circuit, and now this Court. *See Cons[illegible]tine*, 545 So. 2d at 756. Moreover, as the Alabama Supreme Court has found no constitutional violation, and thus no deprivation of a constitutional right, Carol Kiker's claim was defective as a matter of law, and was thus vulnerable to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

C. Petitioners' Counter-Arguments Regarding Preclusion are Meritless.

In connection with both the *Rooker-Feldman* jurisdictional preclusion issue and the collateral estoppel issue, Petitioners renew their contentions that the procedural due process issues Carol Kiker raised in this proceeding were not before the Alabama Supreme Court and were not "actually decided" by it. Petitioners posit that (despite Carol Kiker's filing of a notice of *appeal* from Judge Miller's order dismissing her as Russell County Registrar, and despite the styling of her briefs in the

Alabama Supreme Court as briefs on *appeal*), the proceedings before the Alabama Supreme Court were actually pursuant to common-law *certiorari* rather than appeal. Petitioners further argue that because the Alabama Supreme Court's review was necessarily confined to the strictures of *certiorari*, under the rationale enunciated in *Webb v. State of Ala.*, 850 F.2d 1518, 1520 (11th Cir. 1988) (a case upon which she places heavy reliance) the Alabama Supreme Court's resolution of this matter is in her view not entitled to preclusive effect.

This argument is completely meritless. The Alabama Supreme Court issued an order finally disposing of its review of Carol Kiker's claim on August 20, 1993, stating as follows:

> Per Curiam *Affirmed*. No opinion. See Rule 53(a)(1) and (a)(2)(A), Ala. R. App. P.

Kiker, 629 So. 2d at 453 (emphasis added). On the same day, the Alabama Supreme Court issued its "Certificate of Judgment of *Affirmance*," which provided as follows:

> The *appeal* in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the *judgment* of the Court below is *affirmed*.

Id. (emphasis added) Respondent's App. 3.[10]

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[10] Petitioners cannot suggest that the Alabama Supreme Court's affirmance without opinion signifies that Carol Kiker's appeal was given less than full consideration and cannot estop her from asserting the same claims in federal court. To the contrary, the Alabama court's decision cites Rule 53(a)(2)(A) of the Alabama Rules of Appellate Procedure, which provides that

Thus, the Alabama Supreme Court has necessarily determined that the proceedings before it were in the nature of an appeal, not a petition for an extraordinary writ. Its Order and Certificate *affirm* the *judgment* of Judge Miller; they do not *deny* any application for extraordinary writs. There is no indication from the Alabama Supreme Court's Order and Certificate that it was denying (or had considered) any petition for an extraordinary writ under Rule 21(a) or (c) of the Alabama Rules of Appellate Procedure. Thus, the Alabama Supreme Court has necessarily concluded that the Order entered by Judge Miller was a *judgment* that would support an appeal and not another type of order that would support only an application for a mandamus or certiorari.

Beyond the orders issued by the Alabama Supreme Court, it is plain from a cursory review of the documents filed by Carol Kiker in seeking state appellate review of the order removing her from office that she was not seeking certiorari review. The Alabama Rules of Appellate Procedure require the filing of a petition for an extraordinary writ with the *clerk of the appellate court*, complete with: a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the

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it may affirm a judgment "when the order appealed from is based on findings of fact that are not clearly, plainly, or palpably erroneous." This holding necessarily affirmed Judge Miller's factual findings and rejected Carol Kiker's contentions on appeal to the Alabama Supreme Court, which, like the petition to this Court, concerned only her due process issues.

record essential to an understanding of the matters set forth in the petition. Ala. R. App. P. 21(a). Carol Kiker's Notice of Appeal filed in Russell County contained none of these elements, nor did her brief contain portions of the record necessary to understand the issues involved (primarily because the trial court clerk's office, as is customary in the case of *appeals* from lower courts, prepared the records itself in accordance with Rule 10(b) of the Alabama Rules of Appellate Procedure). Thus, the documents filed by Carol Kiker to instigate review did not constitute a *bona fide* application for a writ of certiorari.

Even if the Alabama Supreme Court erred, however, in its procedural characterization of the matter before it as an appeal, its decision is now final, and under 28 U.S.C. § 1738, procedurally binds both Petitioners and reviewing courts in this proceeding just as much as would a substantive determination. Carol Kiker, in order to challenge the Alabama Supreme Court's characterization of the review proceeding as an appeal rather than an application for writ of certiorari, should have requested that court to explicitly rule on that issue, or to request that court to correct its "error" via rehearing; however, as she did not raise this issue at any time in the state proceedings or in a timely filed petition for writ of certiorari to this Court, she cannot collaterally attack the Alabama Supreme Court's procedural ruling now.

Moreover, even if she were able to raise such a challenge, the arguments she advances for distinguishing "pure" appellate review of her dismissal from certiorari review lose much of their strength in the context of this case. While the Eleventh Circuit, construing Alabama law, ruled in *Webb* that a former foster parent could not raise

due process issues in the context of certiorari review of an Alabama Department of Pensions and Security panel in the family court division of the Circuit Court of Montgomery County, it is a much different proposition to state that a discharged judicial employee cannot raise due process issues on "certiorari" review of her termination. Indeed, in much more analogous factual settings, Alabama appellate courts have considered and decided due process issues raised by terminated employees in certiorari proceedings. For example, in *Holloway v. Personnel Bd. of Jefferson County*, 528 So. 2d 341 (Ala. Civ. App. 1988), not only was certiorari held to be the proper method of review of a panel reviewing the termination of a county employee, but the Court also considered the employee's due process deprivation claim and resolved it against him. *Id.* at 342-43. The court similarly considered and rejected the due process claims of a dismissed county employee in *Minton v. Personnel Bd. of Jefferson County*, 406 So. 2d 435, 436-37 (Ala. Civ. App. 1981). Finally, although concluding that the petitioner had no standing to raise a due process issue, the Court of Civil Appeals did not find the scope of certiorari review any barrier to its consideration of due process in *Marshall Durbin & Co. v. Alabama Dep't of Envtl. Mgt.*, 537 So. 2d 490, 493-94 (Ala. Civ. App. 1987), *rev'd on other grounds*, 537 So. 2d 496 (Ala. 1988).

In fact, the Alabama Supreme Court has held that, not only are due process issues properly raised in proceedings seeking a common law writ of certiorari, but Alabama courts are specifically *required* to review due process issues on petition for common law certiorari. In *Evans v. City of Huntsville*, 580 So. 2d 1323 (Ala. 1991), a former waste treatment worker employee brought an

action against his former employer (a municipality) in an Alabama circuit court seeking issuance of a common law writ of certiorari to challenge the city's termination of his employment. On appeal from the circuit court, the Alabama Supreme Court held that the employee's due process rights were violated by a procedure that allowed him to be discharged simply for cursing at his supervisor. Instructive is the following language from the *Evans* opinion discussing the scope of review on common law certiorari due to be employed by Alabama courts:

> Because there is no statutory right to appeal decisions of the City Council in employment cases, the circuit court properly utilized common law certiorari to review the decision. *Personnel Bd. of Jefferson County v. Bailey*, 475 So.2d 863, 867 (Ala.Civ.App.1985). Therefore, its scope of review was limited to determining if the decision to terminate Evans was supported by legal evidence and if the law had been correctly applied to the facts. *Ex parte Bracken*, 263 Ala. 402, 405, 82 So.2d 629, 631 (1955); *Bailey, supra*, at 868. In addition, the court was responsible for reviewing the record to ensure that the fundamental rights of the parties, *including the right to due process*, had not been violated. *Ex parte Greenberg*, 395 So.2d 1000, 1002 (Ala. 1981).

Evans, 580 So. 2d at 1325 (emphasis added). This language clearly indicates that Petitioners' contention that Carol Kiker was "prevented" from raising or obtaining meaningful review of her procedural due process claims in the Alabama Supreme Court is completely ludicrous, and illustrates this case's complete dissimilarity from

Webb, wherein it was "uncertain" whether the due process claims could have been raised before the judicial body.

Thus, Petitioners have failed to show that Carol Kiker was entitled to only certiorari review in the Alabama Supreme Court, that they were provided only certiorari review, or that in receiving only certiorari review, she was somehow deprived of her due process rights.[11]

Despite their extensive efforts to expose the apparent indecision among the Circuits regarding the application and fairness of the *Rooker-Feldman* doctrine, Petitioners were not, as they suggest, caught between a proverbial rock (the alleged unavailability of a forum in which to raise her due process claims in state court) and a hard place (the district court's dismissal of the case based on its finding that her claims were precluded). Contrary to Petitioners' claim that they were confronted with a "legal quagmire" regarding their rights following the entry of Judge Miller's order removing Carol Kiker from office, it is clear that she both had and exercised her right to have that order reviewed in a meaningful way by the Alabama Supreme Court.

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[11] Although Petitioners correctly note that under Alabama law, "certiorari cannot be exercised to review the judgment as to its intrinsic correctness," the appellate court will examine whether "the proceedings were valid and regular" and whether "there is any evidence to support the [trial court's] order." *Alabama Elec. Co-operative, Inc. v. Alabama Power Co.*, 278 Ala. 123, 176 So. 2d 483, 485 (1964). While its scope of inquiry is limited, this form of review still satisfies minimum due process requirements.

Ultimately, the sole question Petitioners present to this Court is whether Carol Kiker had the opportunity to assert, in connection with review of her dismissal in the Alabama Supreme Court, claimed procedural defects in Judge Miller's conduct of her show cause proceedings. The governing law of Alabama and the record on appeal clearly indicate that not only *could* she raise her procedural due process claims on appeal or certiorari to Alabama's highest court, but also that she *did* so. Because the Alabama Supreme Court necessarily ruled that Carol Kiker's due process contentions were meritless, she may not renew them in a separate original § 1983 action in federal court, as the district court in this case correctly noted. As neither *Rooker-Feldman* nor collateral estoppel permit maintenance of these claims, the district court properly dismissed them on motion of the Defendants, and the Eleventh Circuit did not err in affirming the judgment.[12]

CONCLUSION

For the foregoing reasons, the orders of the United States District Court for the Middle District of Alabama dismissing Carol Kiker's claims against John Pelham Ferrell were correct, and were properly affirmed by the

[12] Petitioners' failure to demonstrate that Ferrell "reached an understanding" with Judge Miller to violate any of Petitioners' rights constitutes a separate and independent ground warranting affirmance of the judgment in favor of Ferrell against Carol Kiker.

Eleventh Circuit. Granting the petition for a writ of certiorari in this case would therefore serve no purpose. Petitioners' request for certiorari review should therefore be denied.

Respectfully submitted this the 22nd day of January, 1998.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE
MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

CAROL KIKER, Plaintiff, v. PAUL J. MILLER, JR., individually and as Circuit Judge of Russell County, Defendant.	)	CIVIL ACTION NO. 94-T-56-E

JUDGMENT

(Filed Apr. 12, 1996)

On the 12th day of April 1996, after this cause had been submitted to a Jury, a verdict was returned as follows:

> 1. Has plaintiff Carol Kiker established by a preponderance of the evidence that her activities regarding a pay raise for state court personnel were a substantial, that is, a motivating factor for her firing?

Yes ___
No X

XXX

DONE, this the 12th day of April, 1996.

/s/ Gloria M. Morgan
Foreperson

Accordingly, it is the ORDER, JUDGMENT, and DECREE of the court that judgment is entered in favor of defendant J. Paul Miller, Jr., and against plaintiff Carol Kiker, with plaintiff Kiker taking nothing by her complaint.

IN THE SUPREME COURT OF ALABAMA

August 20, 1993

1920702

Carol Kiker, Register, 26th Judicial Circuit v. Hon. Paul J. Miller, Jr., Judge, 26th Judicial Circuit. (Russell: CV-92-5040)

CERTIFICATE OF JUDGMENT

of Affirmance

The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the court below is affirmed.

IT IS FURTHER ORDERED that the costs of appeal be taxed against the appellant(s) as provided by Rule 35, Alabama Rules of Appellate Procedure.

NO OPINION.

PER CURIAM – Maddox, Almon, Shores, Adams, Houston, Steagall and Ingram,

JJ., concur.

Supreme Court, U.S.
FILED
MAR 4 1998
CLERK

No. 97 - 910

In The

Supreme Court of the United States

October Term 1997

Carol Kiker and Devon Kiker

Petitioners,

vs.

Paul J. Miller, Jr.,
Individually and as Circuit Judge of the Circuit Court of Russell County,
and J. Pelham Ferrell,

Respondents

Petition for Writ of Certiorari to the United States Courtt of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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ARE CLAIMS PRECLUDED IN FEDERAL COURT WHERE CLAIMANT WAS SUBJECTED TO SHOW CAUSE HEARING IN STATE PROCEEDING AT WHICH HEARING OFFICER REFUSED HER THE RIGHT TO CROSS EXAMINE WITNESSES OR PRESENT HER OWN EVIDENCE, AND CLAIMANT SOUGHT STATE REVIEW BY COMMON LAW WRIT OF CERTIORARI?

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1. STANDARD OF REVIEW IN THE ALABAMA SUPREME COURT

Respondent Ferrell insists that the Alabama Supreme Court reviewed the administrative "hearing" afforded Carol Kiker under a direct appeal, but offers no evidence whatsoever of any statutorial right to such appeal. Likewise Ferrell does not provide evidence that any similar case has ever been reviewed by direct appeal. The only modern case addressing the removal of a register in Alabama is the case of Fortson vs. Hawkins 321 So.2d 196 (1975). In the *Fortson* opinion the court said:

> "A discharged salaried county register filed original petition for writ of mandamus, prohibition or certiorari seeking reinstatement by the county's presiding judge who had ordered her removal ....." (emphasis added).

It is clear from the above language that *Fortson* was reviewed on an extraordinary writ and not by direct appeal. The petition filed in Carol Kiker's request for review by the Alabama Supreme Court was entitled: NOTICE OF APPEAL OR IN THE ALTERNATIVE FOR WRIT OF MANDAMUS, PROHIBITION OR CERTIORARI. The court affirmed without an opinion and without explaining the standard for review. Kiker v. Miller, 639 So.2d 961

Contrary to Ferrell's assertions, Carol Kiker did file a request for re-hearing in which she urged the court to render a written opinion. The following language is taken from the conclusion of the brief on request for re-hearing.

> "Based on the foregoing, Appellant would respectfully submit that the actions of Judge Miller were violative of her constitutional rights to procedural due process and that this Honorable Court erred in affirming her removal from office without offering even an opinion explaining its reasoning. To allow this action to stand casts doubt upon the integrity of the judicial system when it comes to judging the actions of one of its own." (emphasis added)

The Alabama Supreme Court could not have decided the issues raised in Petitioners' Section 1983 suit. The Alabama court could not award punitive damages prayed for in the federal court action. The court did not have the benefit of any of petitioner's evidence as to the pretextual nature of the respondents' actions, nor evidence of the respondents' conspiracy to restrict the record.

The best evidence that the Alabama Supreme Court did not review the administrative hearing for compliance with due process is the transcript of the hearing itself. It is disingenuous for Ferrell to argue to this court that the Alabama Supreme Court ruled that such an outrageous parody comported with the requirements of due process. Further, the Alabama Supreme Court had earlier ruled in the mandamus proceeding for Judge Miller's recusal that Carol Kiker was entitled to no hearing whatsoever prior to being removed from office. Therefore, the question becomes "What relief was available in the Alabama Supreme Court?" Clearly that court did not recognize the "for cause" standard in the statute providing for removal of a register as constituting a property interest triggering due process. Such position is in direct conflict with case law of the Eleventh Circuit.

> "A state employee that may be discharged at will under state law has no property interest in his or her job but a state employee whose employment may be terminated only for cause has a property interest in the state employment and is entitled to due process protection." Thompson v Bass, 616 F.2d 1259 (1980)

Ferrell makes much ado of the Alabama Supreme Court's usage of the words "affirmed" and "judgment" in their disposition of the review of Carol Kiker's removal from office as his proof that the case was heard on direct appeal. This is a wholly frivolous argument as a quick perusal of cases reviewed on certiorari reveal that it has long been the custom of that court to use such language. See Henderson v Montgomery City-County Personnel Board, 695 So 2d 9 (1996), Mitchell Motor Co. v Burrow, 66 So 2d 198 (1953), Linch v. Scott, 93 So 326 (1922)

Further, the Alabama Supreme Court, has settled the question of whether a federal civil rights case is barred after having been appealed through the Alabama courts. In 1989, the court answered a certified question from the United States District Court for the Middle District of Alabama. It held that neither doctrine of res judicata nor collateral estoppel bars state courts from hearing a teacher complain of wrongful transfer on theory of violation of federal civil rights law after the teacher, for same factual transaction, had processed previous proceeding pursuant to state statutory rights Carlisle v. Phenix City Board of Education, 543 So.2d 194 (1989)

II. FERRELL'S ACTS CONSTITUTE CONSPIRACY

Ferrell understandably attempts to distance himself from Respondent Miller's actions in this case. However, the record in the case does not support such position. There is evidence that approximately six months prior to the filing of the cases involving the Kikers' sons which were used for Carol Kiker's removal from office, respondents attempted to bring charges of jury tampering against petitioners. When that effort failed, they turned to the domestic cases as the basis for their actions.

There is evidence that Ferrell counseled Miller to grant a continuance in the administrative hearing "to avoid a technicality." There is also evidence that Ferrell approached a potential witness, the Russell County District Attorney, for the purpose of dissuading him from acting favorably to petitioners.

Ferrell has admitted that he carried a report to Miller that Carol Kiker had discussed rumors of Miller's alleged affair with his secretary. Ferrell has further admitted that the report was false and that he could name no person who had ever informed him of any such conduct by Carol Kiker. Shortly after making this false report, Ferrell accepted Miller's appointment to serve as amicus curiae in the action brought against Carol Kiker despite the Alabama Canons of Judicial Ethics which require that such person be "disinterested and impartial." Canon 3(A)4, Alabama Canons of Judicial Ethics.

Ferrell's assertion that he attended the administrative hearing simply as an "old friend" of Miller is in error. The following

undisputed testimony was given by Hon. David B. Bryne who represented Carol Kiker at the administrative hearing:

> "Q. And state again, if you don't mind, because maybe I'm not recalling it exactly, what did Mr. Ferrell say to you that morning was his reason for being present?"
>
> "A. My recollection is that about the time we got to the top of that stairwell, counsel approached us and said, "let me speak to you for a moment." And we conversed in the hall, and he made the statement that, "I've been asked by Judge Miller to serve as amicus. I wanted to let you know about that.""

Ferrell attended the administrative hearing and sent signals to Miller as to the rulings on evidence by nodding or shaking his head to ensure that the record would contain no exculpatory evidence.

Deposition testimony was elicited that Ferrell met with Miller and his secretary at the county courthouse on a state holiday the day before the order removing Carol Kiker was filed. The meeting lasted several hours in the building that was closed to the public. Petitioners contend that the meeting was for the purpose of preparing the order of removal.

III. PETITIONERS ARE ENTITLED TO NAME-CLEARING HEARING.

Ferrell claims that petitioners are not entitled to a name-clearing hearing under *Buxton* because the element of *falsity* is

not present in this case. Deposition testimony has been taken from the other judges of the circuit that prove the findings in the order removing Carol Kiker from office are completely false. Respondent Miller also admitted on deposition that the findings were false. As an example, in the order removing Carol Kiker from office, respondents made the following finding in paragraph 6:

> "That both of the petitioners, former daughters-in-law of the Register and Clerk of this Court, suffered monetary losses in child support and potential deprivation of medical care of their children since these cases were not treated in the ordinary course of business."

When Miller was questioned about this finding on deposition the following testimony was given:

Q. "Okay. Were either-------"

A. "Whether they're (sic) lost money in that, I don't know."

Q. "You don't know if they lost anything?"

A. "I don't know if they lost money, no, sir"

Petitioners have served collectively for more than 56 years in the Circuit Court of Russell County, Alabama. Prior to the attack on their character by respondents, petitioners enjoyed a reputation for honesty and integrity both personally and professionally. Respondents contrived to ravage the good name of petitioners, and by doing so foreclosed other employment

opportunities to Carol Kiker. Respondents were required to provide a name- clearing hearing.

> "We hold that a public employer is required to provide the opportunity for a post-termination name-clearing hearing when stigmatizing information is made part of the public records, or otherwise published. Notice of the right to such a hearing is required." Buxton v. City of Plant City, Florida, 871 F.2d 1037, (11th Cir. 1989)

Five years later, petitioners have still not been afforded a name-clearing opportunity to remove the stigma placed on their name by respondents.

IV. PETITIONERS FAILURE TO RAISE FIRST AMENDMENT ISSUES.

Respondents raise in brief the petitioners' failure to appeal the jury's verdict on the first amendment issues. Petitioners respond as follows: This case was filed in the District Court on January 18, 1994. Respondents forthwith filed a motion to dismiss. For the next 17 months the district court failed to rule on the motion to dismiss. Petitioners were not allowed to proceed with deposition testimony during this time despite filing numerous motions to be allowed to do so. Beginning in July of 1992 and continuing during this period petitioners were pummeled with adverse publicity generated by respondent Miller's accusations, and his findings that respondents had committed misfeasance in office. In October of 1995 the district court ordered a trial on the first amendment issues only, and allowed depositions. By this time the events relative to the case

were four years old and much testimony favorable to petitioners had been lost.

The district court summarily denied petitioners' motion for a name-clearing hearing without addressing the precepts of *Buxton*. Petitioners' motion to take an interlocutory appeal to address the denial of a name-clearing hearing was denied. Thus, petitioners were put to trial in April of 1996 on the first amendment issue after bearing four years of adverse publicity in the entire geographical area from which the jury pool was drawn. The publicity was, in large part, generated and urged by respondents.

Petitioners, who are not attorneys, have incurred expenses of approximately $70,000 in their efforts to remove the stigma placed on the their name by respondents. These expenses were incurred during the time that Carol Kiker has been deprived of approximately $280,000 in income. Petitioners' decision not to appeal the jury verdict was based on economic considerations, and not because there was no merit in such an appeal. Likewise, petitioners have failed to raise all the issues that are worthy of review simply because they lack the resources and the expertise to do so.

CONCLUSION

Petitioners, in pursuing their case to this level, have relied on the constitutional guarantees of due process enunciated by this court.

> "An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the

> nature of the case." Mullane v. Central Hanover Bank & Trust Co., 70 S.Ct. 652, (1950)

Here, the loss to petitioners is one of the most profound losses one can bear: the loss to an entire family of their good name. Secondarily is the financial devastation caused by the loss of income. The false accusations of respondents are particularly cruel and injurious to petitioners as they imply that petitioners are so base in character that they acted to withhold support money from their own grandchildren. Respondents, who are both seasoned in the practice of law, knew of the legal duty to provide due process protections prior to, and after, ravaging the good name of a family and prior to the deprivation of property in the form of income. They have arrogantly ignored that responsibility and have based their entire defense in this case on technical issues of estoppel, rather than defending their deplorable conduct. Both respondents have experience with the frailties of Alabama's common law certiorari and have contrived in this case to take advantage of its deficiencies. There can be no other explanation - and indeed neither respondent has offered any - for their conduct of the administrative hearing. To allow the district court's dismissal of the due process issues in this case to stand is a gross miscarriage of justice and puts at risk the numerous other employees in Alabama whose removal is subject to a "for cause" standard.

Petitioners respectfully request that the court grant the Petition for Writ of Certiorari.